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No.

In The

Supreme Court of the United States

October Term, 1980

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually And In His Official Capacity; and EDWARD W. MAHER, Individually And In His Official Capacity,
Petitioners,

vs.

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK and LINDA BROOKS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

In a Title VII action in which the final outcome of the employee selection process does not result in an adverse impact against the plaintiffs' minority group, can the plaintiffs make a *prima facie* showing of employment discrimination by merely establishing: (1) that they failed to succeed on a component of the selection process and thereby become ineligible to proceed further in the selection process and (2) that the results of such component had a disparate impact on plaintiffs' minority group?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States

The Petitioners, State of Connecticut, Department of Administrative Services of the State of Connecticut, Department of Income Maintenance of the State of Connecticut, Elisha C. Freedman, individually and in his official capacity, and Edward

W. Maher, individually and in his official capacity, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 26, 1981.

OPINIONS BELOW

The opinion of the United States District Court for the District of Connecticut has not yet been officially reported. The Court's Memorandum of Decision is printed in the Appendix at pp. 18a-27a below.

The opinion of the United States Court of Appeals for the Second Circuit has not yet been officially reported. The Court's slip opinion is printed in the Appendix at pp. 2a-16a below.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made and entered on March 26, 1981 and a copy is appended to this petition in the Appendix at p. 1a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is § 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 (1976). The pertinent parts are set forth below:

> (a) It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice...for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

STATEMENT OF THE CASE

Four plaintiffs, Winnie Teal, Rose Walker, Edith Latney, and Gracie Clack, are black employees of the Department of Income Maintenance of the State of Connecticut. Serving provisionally in positions in the classification of Welfare Elibibility Supervisor, they sought permanent appointments to that class. This required that they compete in a merit selection process. The merit selection process involved a written examination and the selection by the appointing authority of appointees from a list of the eligible persons who passed the examination. The four black plaintiffs, along with 325 others, took the examination on December 2, 1978. These four plaintiffs failed the examination. Of the 329 examinees, 74.77 percent passed the examination. Black candidates had a 54.17 pass rate. White candidates had the highest pass rate of any group, 79.53 percent. Thus the examination pass rate for black candidates was approximately 68 percent of the examination pass rate of white candidates. However, 22.91 percent of the black candidates who took the examination received promotions to Welfare Eligibility Supervisor, while only 13.51 percent of the white can-

didates who took the examination were promoted. Therefore, the ultimate success rate of blacks who entered the promotion process was 169.5 percent of the whites' success rate.

The District Court, in evaluating the selection process for adverse impact, used the "eighty percent rule" of the Uniform Guidelines on Employee Selection Procedures adopted by the Equal Employment Opportunity Commission, 29 C.F.R. § 1607.4(D) (1979). Under the four-fifths rules, "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded...as evidence of adverse impact." Since the black selection rate (22.91 percent) was higher than the white selection rate (13.51 percent), the District Court found no adverse impact. No evidence of discriminatory intent having been presented, the District Court ruled against the plaintiffs on their Title VII claim. *Teal* v. *Connecticut,* No. B-79-128 (D. Conn. July 31, 1980). (App. p. 24a).

The District Court, on similar reasoning, denied the claim of the four black plaintiffs under § 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1976). *Id.* (App. p. 24a). The claims of the four black plaintiffs and the additional four plaintiffs, who were white, under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976), were also dismissed. On the § 1983 equal protection claims the Court found a lack of proof of intent to discriminate, and on the due process claims the Court found the absence of a property interest. *Id.* (App. p. 24a).

The eight plaintiffs also made a pendent claim that the written test violated Conn. Gen. Stat., § 5-219, which requires that examinations for state employees "fairly test and determine the qualifications, fitness and ability of the persons tested to perform the duties of the class or position to which they seek appointment." The District Court ruled against the plaintiff on this claim on the ground that there is nothing in the language of the state statute to suggest that the state legislature contemplated a validation study. *Id.* (App. p. 26a).

The plaintiffs appealed to the Court of Appeals two of the District Court's rulings, the one on the Title VII issue and the one on the pendent claim.

The Court of Appeals reversed the District Court on the Title VII issue, holding that the examination itself must be assessed for adverse impact, because it constituted a pass-fail barrier beyond which the black plaintiffs, having failed it, were not allowed to proceed. Since the examination results considered by themselves, had an adverse impact on blacks, a *prima facie* case of employment discrimination was established, notwithstanding the fact that the results of the overall selection procedure produced no adverse impact on blacks. *Teal* v. *Connecticut,* No. 80-7675, slip op. at 2103 (2d Cir. Mar. 26, 1981). (App. p. 2a).

The Court of Appeals remanded the case to the District Court to evaluate the job-relatedness of the written examination. The Court noted that if the test should prove to be job-related under Title VII, that would dispose of the pendent claims, since plaintiffs conceded that Conn. Gen. Stat., § 5-219 placed no greater burden on the defendants than did Title VII. *Id.,* slip. op. at 2106 n.3. (App. p. 6a).

The District Court had jurisdiction over the title VII claim by virtue of § 706(f) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decisions of other Courts of Appeal on the same issue.

The Third Circuit has ruled that, under a disparate impact analysis, an employer's "no beard" policy for employees holding public contact jobs is not a violation of Title VII unless the plaintiff has proved, not only that such policy has a substantial disproportionate effect on a minority group, but that it "selects

applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *EEOC* v. *Greyhound Lines, Inc.*, 635 F.2d 188, 191 (3rd Cir. 1980). That is, for the plaintiff to prevail, "it had to show that enforcement of the policy resulted in actual discrimination in the employer's workforce." *Id.* at 192.

This "bottom line" approach has also been adopted by the Fourth Circuit. In *Friend* v. *Leidinger*, 588 F.2d 61 (4th Cir. 1980), that court held that the promotion process employed by the City of Richmond for the position of Fire Lieutenant should be evaluated at the bottom line for adverse impact. A candidate had to pass a written test before he could proceed to the oral phase of the promotion process. The Court held, though the written test had an adverse impact on blacks, Title VII does not require that the test be proved to be job-related, since the ultimate results of the entire selection procedure had no adverse impact on blacks. *Id.* at 66.

In *EEOC* v. *Navajo Refining Co.*, 593 F.2d 988 (10th Cir. 1979), a Title VII action, there was disparity on an employment test which was a prerequisite to employment, between the results obtained by Anglos and those obtained by Spanish Surnamed Americans (SSA's). This disparity caused the employer to make some statistical adjustments to equalize the scores of the two groups. The Tenth Circuit held that it need not reach the issues of disparate test results or the job-relatedness of the test when the number of SSA's actually hired was not disproportionate to the number of SSA's who applied for employment. *Id.* at 992.

In addition, the Sixth Circuit, in *Smith* v. *Troyan*, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976), has expressed a preference for assessing the adverse impact of an employee selection procedure at "the bottom line," in the hiring results, rather than in the test results themselves. *Id.* at 498.

The issue of whether or not a minority plaintiff who fails to get over an obligatory hurdle in an employee selection process can make a *prima facie* showing of employment discrimination

merely by establishing an adverse impact at that hurdle, when there is no adverse impact on the final product of the overall selection procedure, is one which has not been decided by the Supreme Court, but should be. The Court should clarify whether Title VII prohibits unintentional discrimination in employment testing per se, as opposed to unintentional discrimination in hiring. In light of the conflicting signals from the Courts of Appeal, employers who have no intent to discriminate need guidance as to whether they are to be subject to the necessity of establishing the validity of their tests in a judicial forum, when their hiring or promotion statistics reveal no adverse impact on minorities. Putting it somewhat differently, employers need to know whether Title VII provides for a scrutiny of their promotion or selection devices, when they have not intentionally discriminated, and the results of the selection or hiring processes have had no adverse impact on any protected group. See Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law,* 12 N.C. Cent.L.J. 1, 14 (1980).

Although the Supreme Court has not directly addressed the "bottom line" issue, the Court of Appeals in this case has decided the issue in a way which is contrary to the interpretation of Title VII by the Supreme Court set forth in other cases.

The goal of the Civil Rights Act of 1964 is "the integration of blacks into the mainstream of American society...." *United Steelworkers of America, AFL-CIO-CLC* v. *Weber,* 443 U.S. 193, 202 (1979). Title VII is primarily intended to correct the fact that certain occupations had been traditionally closed to minorities. *Id.* at 203, (citing remarks of Senator Humphrey in the legislative debate of Title VII, 110 Cong. Rec. 6548); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417 (1975); *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 429-30 (1971). "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Co., supra* at 431.

To make out a *prima facie* case of discrimination in hiring or promotion through the use of employment tests, plaintiff must

bear the burden of showing "the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 425. When the test itself is not the selection process, but only a component of it, the focus must be on the results of the selection process not on the test results themselves. The Supreme Court itself has cautioned against rigid or mechanistic application of methods it has developed for the shifting of the burden of proof in Title VII cases. See *Furnco Construction Co.* v. *Waters,* 438 U.S. 567, 577 (1978). This is especially true with respect to statistics. The use to which they can properly be put depends on the circumstances. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 340 (1977), citing *Hester* v. *Southern R. Co.,* 497 F.2d 1374, 1379-1381 (5th Cir. 1974).

To focus on test results, as opposed to hiring or promotion results, as a touchstone for determining whether or not a *prima facie* case of employment discrimination has been established, is to interpret Title VII's thrust to be directed toward the testing of minority groups rather than toward the hiring of minorities.

A "prima facie case" in Title VII context refers to "a legally mandatory rebuttable presumption." *Texas Department of Community Affairs* v. *Burdine,* _____ U.S. _____, 49 U.S.L.W. 4214, 4216, n. 7 (1981). If federal courts are going to fashion a legally mandatory presumption of employment discrimination out of test statistics, *ipso facto,* when hiring or promotion statistics reveal no disparate impact, then they will be redirecting employers' resources and overriding concerns from the overall hiring process to the testing process, and in that sense be restructuring business practices. This is something that the federal courts are not competent to do, and they should not attempt to do it unless Congress has required it. *Furnco Construction Co.* v. *Waters, supra,* 438 U.S. at 577, 578. Title VII "does not require the employer to restructure his employment practices to maximize the number of minorities and women hired." *Texas Department of Community Affairs* v. *Burdine supra,* _____ U.S. at _____, 49 U.S.L.W. at 4217.

In *Furnco, supra,* where the employer hired, not at the gate, but through recommendations and personal contacts available to white supervisors, the court looked at hiring statistics in relations to the area labor pool and considered irrelevant whether the practice of hiring through personal contacts disproportionately excluded blacks from consideration. See dissent of Marshall, J., 438 U.S. at 583-84; Blumrosen, *The Bottom Line Concept In Equal Employment Opportunity Law,* 12 N.C. Cent.L.J. 1, 10-11 (1980).

The Supreme Court has made a distinction between the impact of an employer's overall hiring standards and those of any particular requirement, and has indicated that it is only after the overall impact of the selection process is established to be discriminatory, that the employer must show the job-relatedness of any particular requirement.

> Once it is shown that the employment standards are discriminatory in effect, the employer must meet the burden of showing that any given requirement [has] a manifest relationship to the employment in question. *Griggs* v. *Duke Power Co., supra* at 432.

Dothard v. *Rawlinson,* 433 U.S. 321, 329 (1977).

CONCLUSION

The petition for certiorari should be granted. The Supreme Court should review this case because the Courts of Appeal are in conflict on the question of whether disparate impact under Title VII is to be determined at the bottom line. This issue is one of substantial public importance under federal law and the time is ripe for the Supreme Court expressly to settle the question.

Respectfully submitted,

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June 17, 1981

No.

In The

Supreme Court of the United States

October Term, 1980

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually And In His Official Capacity; and EDWARD W. MAHER, Individually And In His Official Capacity,

Petitioners,

vs.

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK and LINDA BROOKS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In The

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of March, one thousand nine hundred and eighty-one.

Present:

HON. WILLIAM H. TIMBERS
HON. THOMAS J. MESKILL, *Circuit Judge*
HON. LEE P. GAGLIARDI, *District Judge*

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK and LINDA BROOKS,
Plaintiffs-Appellants

vs.

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually And In His Official Capacity; and EDWARD W. MAHER, Individually And In His Official Capacity,
Defendants-Appellees.

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action

be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO, Clerk

by Arthur Heller, Deputy Clerk

OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

In The

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 444 — September Term, 1980
(Argued December 22, 1980 Decided March 26, 1981)

Docket No. 80-7675

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK and LINDA BROOKS,
Plaintiffs-Appellants

vs.

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually And In His Official Capacity; and EDWARD W. MAHER, Individually And In His Official Capacity,
Defendants-Appellees.

Before:
TIMBERS AND MESKILL, *Circuit Judges,* and
GAGLIARDI, *District Judge.**

*Honorable Lee P. Gagliardi, United States District Judge for the Southern District of New York, sitting by designation.

Appeal from a judgment entered in the United States District Court for the District of Connecticut, Daly, J., dismissing plaintiffs' suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-(17) (1976), for failure to establish a prima facie case.

Reversed and Remanded.

THOMAS W. BUCCI, Bridgeport, Connecticut, *for Plaintiffs-Appellants.*

SIDNEY D. GIBER, Assistant Atorney General, State of Connecticut (Carl R. Ajello, Attorney General, State of Connecticut, Bernard F. McGovern, Jr., Assistant Attorney General, State of Connecticut, of counsel), *for Defendants-Appellees.*

MESKILL, *Circuit Judge:*

This is an appeal from a judgment entered in the United States District Court for the District of Connecticut, Daly, *J.*, dismissing appellants' action instituted under § 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976),[1] for failure to make out a prima facie case of race discrimina-

---

[1]Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> * * * * *
>
> (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice...for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin.

tion.[2] This appeal raises the question whether a plaintiff in a Title VII action may make a prima facie showing of discriminatory impact based upon the disparate results produced by one portion of an employee selection process, where the overall results of the selection process concededly reveal no such imbalance. For the reasons stated below, we hold that where a plaintiff establishes that a component of a selection process produced disparate results *and* constituted a pass-fail barrier beyond which the complaining candidates were not permitted to proceed, a prima facie case of disparate impact is established, notwithstanding that the entire selection procedure did not yield disparate results.

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[2]Plaintiffs also asserted claims under § 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1976); and § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976). The district court noted that the § 1981 claim was governed by Title VII principles, *see Davis* v. *County of Los Angeles,* 566 F.2d 1334, 1340 (9th Cir. 1977), *vacated as moot,* 440 U.S. 625 (1979), and thus dismissed the claim for the same reasons it rejected the Title VII claim. Plaintiffs' § 1983 claim was dismissed for a failure of proof on the issue of intent. *See generally Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 264-71 (1977). The plaintiffs do not appeal these decisions.

BACKGROUND

The plaintiffs, Winnie Teal, Rose Walker, Edith Latney, and Gracie Clack,[3] are black American citizens employed by the State of Connecticut, Department of Income Maintenance. All four plaintiffs were promoted provisionally to the position of Welfare Eligibility Supervisor and served in that capacity for periods in excess of two years. Several of the plaintiffs' superiors

---

[3]The black plaintiffs were joined by four white plaintiffs, David Malstrom, Marian Costa, Jennie Pick, and Linda Brooks, on a pendent state claim that the written test also violated Conn. Gen. Stat. § 5-219 (1980). That section provides in pertinent part:

> Examinations [for state employees] shall...fairly test and determine the qualifications, fitness and ability of the persons tested to perform the duties of the class or position to which they seek appointment. Examinations shall be formulated in cooperation with agencies appointing specific classes of employees and shall be competitive.... Examinations may take the form of written or oral tests, demonstration of skill or physical ability, experience and training evaluation, or in the case of promotional examinations, evaluation of prior performance, or any other examination devices deemed appropriate to measure the knowledge, skill or ability required to perform the duties of the job.

All of the plaintiffs appeal from so much of the district court's order and judgment that dismisses their pendent claim under § 5-219. The defendants, although not conceding that § 5-219 imposes standards as rigorous as Title VII, nevertheless contend that the test administered to the plaintiffs in this case was sufficiently job-related to pass muster under Title VII. Our decision on the Title VII claim requires this action to be remanded and a job-relatedness analysis to be undertaken under the rigorous EEOC Guidelines. The plaintiffs concede that § 5-219 does not place any greater burden on the defendants than does Title VII. Thus, if the test proves to be job-related under Title VII, we need not reach the question whether the test was valid under § 5-219. We note at this time that the plaintiffs have pointed to no authority whatsoever to support their argument that § 5-219 requires greater scrutiny than that applied by Judge Daly below.

testified at trial that the plaintiffs possessed the qualifications for permanent positions as supervisors and praised their performance on the job.

To attain permanent status as supervisors, plaintiffs had to participate in a selection process which requires, as the first step, a passing score on a written examination. Those candidates who pass the written examination form an eligibility pool from which the appointing authority selects persons to fill the permanent positions. In making the final determinations the appointing authority considers the past work performance of the candidates, recommendations of the candidates' supervisors, and to a lesser degree, the candidates' seniority. Additionally, in this final step of the process, the defendants employ an affirmative action program to insure a large representation of minority candidates on the supervisory level. However, only if a candidate passes the written examination and enters the eligibility pool will he be exposed to the rest of the selection process and thus benefit from the consideration of these other factors.

The written test was administered on December 2, 1978 to 329 candidates. The mean score on the examination was 70.4 percent. However, because the black candidates had a mean score of 6.7 percentage points lower than the white candidates, a disparity that the defendants admitted was statistically significant, and because a cutoff score of 70 would have resulted in a disproportionately large number of black candidates failing the exam, the defendants set the passing score at 65.[4] With the passing score set at 65, the following results were obtained:

---

[4]Thus, even at this stage of the selection process, the defendants contend that affirmative action considerations are employed.

Candidate Group	Number	No. Receiving Passing Score	Passing Ratio (%)
Black	48	26	54.17
Hispanic	4	3	75.00
Indian	3	2	66.67
White	259	206	79.53
Unidentified	15	9	60.00
Total	329	246	74.77

The above table reveals that the passing rate of the identified black candidates (54.17 percent) was approximately 68 percent that of the passing rate of the identified white candidates (79.53 percent). All four of the plaintiffs received a score on the written examination lower than 65. Faced with these results, the plaintiffs instituted this action claiming that the written exam discriminated against them on account of their race in violation of Title VII. The plaintiffs asserted their Title VII claims below under both the disparate treatment formula and the disparate impact analysis.[5]

---

[5]The key distinction between the two types of Title VII actions is that proof of discriminatory motive is required under the former but not the latter. A plaintiff can establish a prima facie case of disparate racial treatment under Title VII by showing

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792, 802 (1973). If the plaintiff succeeds in establishing a prima facie case by a preponderance of the evidence, the burden then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* at 802. The latter burden on the defendant is one of production, which is met "if the defendant's evidence raises a genuine issue

More than a year after this action was instituted, and approximately one month prior to trial, the defendants made their first promotions from the eligibility list generated by the written exam. Forty-six persons were promoted to permanent supervisory positions, 11 of whom were black and 35 of whom were white. Of the 48 identified black candidates who entered the selection process, 11, or approximately 23 percent, were promoted; of the 259 identified white candidates who applied, 35, or about 13.5 percent, were promoted. Thus, the actual promotion rate of blacks (23 percent) was approximately 170 percent that of the actual promotion rate (13.5 percent) of identified whites.

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of fact as to whether it discriminated against the plaintiff." *Texas Department of Community Affairs* v. *Burdine,* 49 U.S.L.W. 4214 (Mar. 4, 1981). Once the defendant, by proof of some legitimate reason for the applicant's rejection, has rebutted the presumption created by the plaintiff's prima facie showing, the plaintiff still "must...be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext." *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 804.

Since "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation," *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432, Title VII has also been construed as invalidating employment practices that, although neutral on their face, have a disparate impact upon a protected class. In a disparate impact case, the plaintiff makes out a prima facie case of discrimination by demonstrating that the employee selection device selects "applicants for hire or promotion in a racial pattern significantly different from that of the pool of the applicants." *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975). To rebut a plaintiff's prima facie showing, the defendant must show "that any given requirement [has] a manifest relationship to the employment in question." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432. Finally, "[i]f an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albermarle Paper Co.* v. *Moody, supra,* 422 U.S. at 425 (quoting *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 801).

The district court initially determined that the plaintiffs' discrimination claims should be evaluated under the disparate impact analysis formulated by the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Judge Daly evaluated the results of the selection process under the four-fifths rule of the Uniform Guidelines of Employee Selection Procedures prepared by the Equal Employment Opportunity Commission, 29 C.F.R. § 1607.4(D) (1979). The four-fifths rule provides that "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded...as evidence of adverse impact."[6] While noting that the results of the written test did not satisfy the four-fifths rule, Judge Daly concluded that the results of the *entire* selection process should be used to determine whether the plaintiffs had made out a prima facie case of race discrimination under the disparate impact formula. Since the results of the entire selection procedure actually were more favorable to the black candidates than to the white applicants, Judge Daly dismissed the plaintiffs' action for failure to prove a prima facie case. Thus, the district court found it unnecessary to reach the issue whether the written examination was, indeed, job-related.

DISCUSSION

The plaintiffs contend on this appeal that the district court erred in using the results of the overall selection process in determining that the plaintiffs failed to make a prima facie showing of disparate impact. Alternatively, the plaintiffs argue that the proof adduced at trial was sufficient to establish a prima facie case under the *McDonnell Douglas* disparate treatment formula. The defendants, on the other hand, maintain that the district court was correct in its decision to dismiss the plaintiffs'

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[6]While courts are not bound by the EEOC Guidelines, the Supreme Court has declared that the guidelines should be shown "great deference." *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. 424, 433-34 (1971); *accord, Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975).

complaint and, in any event, contend that the written examination given to the plaintiffs was job-related.

Although the disparate impact and treatment analyses are not necessarily mutually exclusive, *see, e.g., Grant* v. *Bethlehem Steel Corp.*, slip op. 6545 (2nd Cir. Nov. 26, 1980) (prima facie case established under both analyses), we believe that the district court was correct in evaluating this case under the disparate impact formula. Contrary to the assertion of the plaintiffs, their qualifications for the permanent supervisory positions were in dispute. Indeed, the resolution of that issue turned directly upon the validity of the written examination. But employers certainly cannot be compelled to come forward and prove the job-relatedness of an eligibility examination upon a plaintiff-employee's bald assertion that he or she is qualified for the position in question. Indeed, since the burden of proof is upon the plaintiff to prove his or her qualifications for the job to establish a prima facie case of disparate treatment, *see McDonnell Douglas Corp.* v. *Green, supra,* evaluating a case such as the one at bar under that analysis might require placing the burden upon the plaintiffs to prove that the written examination was *not* job-related. We believe that the resolution of the latter issue is best undertaken under the disparate impact analysis that was formulated by the Supreme Court precisely to accommodate cases such as this.

Turning to the disparate impact claim, we conclude that the district court erred in ruling that the results of the written examination alone were insufficient to support a prima facie case of disparate impact in violation of Title VII. While we noted in *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420, 425 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976), that proof concerning the disparate impact of certain sub-tests was of "little relevance...on the issue of whether or not the examination as a whole had an unconstitutional discriminatory impact," there, the passing grade was dependent upon the cumulative results of the sub-tests. Thus, all of the candidates in *Kirkland* were exposed to the challenged selection device in its entirety, and therefore, were able to benefit from

the components of the exam that apparently offset the allegedly discriminatory sub-test. In other words, all of the candidates in *Kirkland* were subjected to the complete selection process, which, when viewed as a whole, did not produce unlawful disparate results. Likewise, in *Smith* v. *Troyan,* 520 F.2d 492, 497-98 (6th Cir. 1975), *cert. denied,* 426 U.S. 934 (1976), a disparate impact case in which the Sixth Circuit rejected a plaintiff's attempt to fragment a selection process in an effort to challenge a written "General Classification Test," the passing score was cumulative.

Viewing the overall results of a selection process ordinarily is a prudent course to pursue, since it places the burden upon the defendant to demonstrate job-relatedness only in situations in which courts can determine with some degree of certainty that a selection device has discriminatorily denied an employment opportunity to members of a protected class. Where all of the candidates participate in the entire selection process, and the overall results reveal no significant disparity of impact, scrutinizing individual questions or individual sub-tests would, indeed, "conflict[ ] with the dictates of common sense." *Kirkland* v. *New York State Department of Correctional Services,* 374 F.Supp. 1361, 1370 (S.D.N.Y. 1974), *aff'd,* 520 F.2d 420 (2d Cir. 1975). Where, however, an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process, a different result must obtain. Otherwise we would be adopting the position that regardless of the language of the statute Congress intended Title VII to protect faceless groups rather than individuals. Title VII cannot be interpreted to permit an obvious denial of employment opportunities to candidates that is solely attributable to non-job-related characteristics they possess that are inherent to their race.[7]

[7]As Justice Powell concisely stated in *McDonnell-Douglas Corp.* v. *Green, supra,* "Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." 411 U.S. at 806.

In *Brown* v. *New Haven Civil Service Board,* 474 F.Supp. 1256 (D. Conn. 1979), the case upon which the defendants principally rely, Judge Newman, then sitting as a district court judge, was confronted by the same issue presented in this case in a similar factual setting. In *Brown,* the plaintiffs alleged that of the 99 blacks who had taken a written employment examination, only 30 passed, whereas 120 of the 194 whites passed. Thus, as to that part of the selection process, the passing rate for blacks was less than half the passing rate of whites. The results of the entire selection process, however, revealed no significant disparity between the actual hiring rates of blacks and whites. Judge Newman held that the plaintiffs could not dissect the overall selection process and challenge the disparate results of one of its components where the final results of the selection procedure did not produce disparate results in actual hiring. Judge Newman advanced two principal bases for this holding. First, he suggested that to

> examine each component of an entire application process [would] launch [ ] a court on a course that has no boundaries and no clear end....
>
> [E]ven if only one question has a disproportionate impact on a minority group, an individual who answers that question incorrectly and then fails by one point to accumulate the minimum required score for hiring can argue that he has been the victim of discrimination in the hiring process. The prospect of a court's examining subtests, sub-subtests, and even individual questions within test segments argues in favor of examining only the end result of an entire hiring process.

Id. at 1262. Second, Judge Newman contended that Title VII should not be interpreted to prohibit employers from adopting voluntary affirmative action programs:

> Specifically, Title VII should not be construed to prohibit a municipality's using a hiring process that results in a percentage of minority policemen approximating

> their percentage of the local population, instead of relying on the expectation that a validated job-related testing procedure will produce an equivalent result, yet with the risk that it might lead to substantially less minority hiring.

Id. at 1263.

With respect to the first contention that courts should not be burdened with having to evaluate the allegedly disparate impact that an isolated sub-test or question might have had, we think that Judge Newman's concern in that regard is justifiable only in connection with cases that might involve a challenge to a disparate "subscore" that was subsumed in a non-disparate, cumulative, overall score. While it is difficult to conceive of how the dry scores of a multi-component selection process could discriminate in part, but not in the aggregate, without the influence of some affirmative action effort designed to achieve the non-discriminatory overall result, in such a case the multi-component selection process would by necessity have to include some internal mechanism that offsets the disparate impact caused by the discriminatory component. Since *all* of the candidates in such a process would have been afforded the opportunity to receive the benefit of the offsetting mechanism, however, the overall results of the process should be deemed a fair barometer of the fairness of the process.

Where a selection process contains a discriminatory pass-fail barrier, however, we see little justification for judicial restraint. In the case of the pass-fail barrier, both the discriminatory component and the affected individuals are readily identifiable. Courts are under an obligation to entertain the claims of individuals who have been victimized by a discriminatory pass-fail barrier, notwithstanding any belated "corrective" action taken by the employer. In such cases only those candidates who do not bear the incidences of their racial group would surmount the discriminatory barrier and benefit from the corrective, affirmative action measure.

Nor are we persuaded that construcing Title VII to invalidate a selection process that includes an affirmative action component to insure non-disparate overall results will frustrate the general objective of achieving racial balance in the workforce. While Title VII may *permit* voluntary affirmative action in some instances, *see United Steelworkers of America* v. *Weber,* 443 U.S. 193, 200 (1979), the statute was never intended to be interpreted as an affirmative action device. Indeed, § 703(j) of Title VII expressly provides that Title VII shall not be "interpreted to *require* any employer...to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist" in that respect in the employer's workforce. 42 U.S.C. § 2000e-2(j) (1976) (emphasis added). But more specifically, an employer's adoption of affirmative action policies has never been held by the courts to relieve the employer of liability under Title VII to persons who were injured by the employer's previous discriminatory conduct. In *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 341-42 (1977), the Supreme Court stated:

> The company's later changes in its hiring and promotion policies could be of little comfort to the victims of the earlier post-Act discrimination, and could not erase its previous illegal conduct *or its obligation to afford relief to those who suffered because of it.*

Id. (emphasis added). *See also Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 584 (1978) (opinion of Marshall, *J.).* Indeed, "[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." *Id.* at 579. In the case at bar, an employee selection device produced a readily discernible disparate impact upon the black candidates. The affirmative action effort taken by the defendants at the end of the process was "of little comfort" to the candidates who were not permitted to proceed beyond the allegedly discriminatory pass-fail barrier.

Title VII was designed to protect the rights of individuals. "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race...." *Furnco Construction Corp.* v. *Waters, supra,* 438 U.S. at 579. "[A] primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees.... An equally important purpose of the Act is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.'" *International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S. at 364. Permitting the overall selection process result in this case to validate what may be the denial of an employment opportunity to a disproportionate number of black candidates is an expedient that transgresses the purpose of Title VII. Where an employment practice forecloses a disproportionate number of persons in a protected group from a job opportunity, it matters very little to the victimized individuals that their group as a whole is well represented in the group of hirees. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432.

Since Judge Daly determined that the plaintiffs failed to establish a prima facie case of disparate impact under Title VII, he evidently thought it unnecessary to reach the question of the job-relatedness of the written examination, even though this issue had been fully tried. Of course, we make no comment on the resolution of that issue. On remand, the district court should evaluate the job-relatedness of the written examination in accordance with the EEOC Guidelines referred to by the Supreme Court in *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 430-31 (1975). *See* 29 C.F.R. pt. 1607 (1979). This panel will retain jurisdiction of any appeal from the district court's decision on that issue.

The judgment of the district court is reversed and this action is remanded for further proceedings consistent with this opinion.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JUDGMENT ON DECISION BY THE COURT

United States District Court

FOR THE

DISTRICT OF CONNECTICUT

Civil Action File No. B-79-128

WINNIE TEAL, et als

vs. JUDGMENT

STATE OF CONNECTICUT, et als

This action came on for trial before the Court, Honorable T. F. Gilroy Daly, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that judgment be and is hereby entered for the defendants.

Dated at Bridgeport, Connecticut, this 5th day of August, 1980.

SYLVESTER A. MARKOWSKI
Clerk of Court

By _____
Deputy in Charge

MEMORANDUM OF DECISION
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

United States District Court

FOR THE

DISTRICT OF CONNECTICUT

WINNIE TEAL, DAVID MALMSTROM, MARION COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK and LINDA BROOKS, *Plaintiffs,*	:	
VS.	:	
STATE OF CONNECTICUT: DEPARTMENT OF ADMINISTRATIVE SERVICES of the State of Connecticut; DEPARTMENT OF INCOME MAINTENANCE of the State of Connecticut; ELISHA C. FREEDMAN, Individually and in his official capacity, and EDWARD W. MAHER, Individually and in his official capacity, *Defendants.*	:	CIVIL NO. B-79-128

MEMORANDUM OF DECISION

Plaintiffs bring this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.;* § 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981; and § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, seeking redress for the alleged deprivation of their rights under those statutes and the fourteenth amendment flowing from the defendant state agencies' administration and use of a promotional examination. Plaintiffs have satisfied the jurisdictional prerequisites to suit under Title VII, and the Court has jurisdiction of the action under 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. § 2000e-5(f). Plaintiffs claim also that defendants' conduct violated Conn. Gen. Stat. § 5-219. The Court has pendent jurisdiction over this claim. *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966).

Plaintiffs Winnie Teal, Rose Walker, Gracie Clack and Edith Latney are Blacks; plaintiffs David Malmstrom, Marion Costa, Jennie Pick and Linda Brooks are Whites. All are employees of Connecticut's Department of Income Maintenance. All were eligible for, took and failed an examination administered on December 2, 1978, by the State Department of Administrative Services for promotion to the position of Eligibility Technician Supervisor in the Department of Income Maintenance.

The following table reveals the results of the examination.

Candidate group	Number	Mean score (%)	Standard deviation	Number receiving passing score	Passing ratio (%)	Number Appointed	Ratios of appointments to candidates (%)
Black	48	64.90	10.31	26	54.17	11	22.91
Hispanic	4	62.25	10.83	3	75.00	—	—
Indian	3	69.97	8.73	2	66.67	—	—
White	259	71.63	8.52	206	79.53	35	13.51
Unidentified	15	67.27	9.04	9	60.00	—	—

The ratio of the black passing rate to the white passing rate is thus 68.11%; the ratio of the black appointment rate to the white appointment rate is 169.58%. The passing rate of 56.36% of all minorities combined is 70.87% of the white passing rate; and the 20.00% appointment rate for all minorities combined is 148.03% of the white appointment rate. Identified Black candidates comprised 15.28% of the candidates who identified their race and 14.59% of the total number of candidates. Identified minorities combined comprised 17.52% of the candidates who identified their race and 16.72% of the total number of candidates. Black or minority appointments constituted 23.19% of all appointments resulting from the examination.

I. The Title VII Claims.[1]

Plaintiffs challenge defendants' use of a promotional examination, a facially neutral selection device which plaintiffs allege

[1]Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice...for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

operated here to discriminate against minorities. They characterize their case as one of disparate treatment, *see, e.g., Furnco Construction Corp.* v. *Waters,* 438 U.S. 567 (1978); *International Bhd. of Teamsters* v. *United States,* 431 U.S. 324 (1977); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). A challenge to a facially neutral selection device, however, is more properly characterized as a disparate impact case under *Dothard* v. *Rawlinson,* 433 U.S. 321 (1977); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975); and *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). *Brown* v. *New Haven Civil Serv. Bd.,* 474 F. Supp. 1256, 1259 n.2 (D. Conn. 1979) (Newman, J.). Indeed, this case is strikingly similar to *Brown.* There Judge Newman noted:

> [T]he passing rates on the written examination establish a *prima facie* case of adverse impact. Plaintiffs allege that of 99 Blacks who took the written exam, 30 passed. The passing rate for Blacks, 30.3%, was less than half of the passing rate for White [sic], 61.9%.
>
> The ultimate results of the entire hiring process, however, show that no *prima facie* case of adverse impact is established. The number of Blacks hired as a percentage of the Black applicants is roughly the same as that for Whites.... [T]he ratio of the hiring rate for Blacks compared to that for Whites is 84%, satisfying the E.E.O.C. 80% guideline.

Id. at 1260 (footnotes omitted). Adopting the bottom line

approach sanctioned by the EEOC Guidelines[2] and the majority of the courts that have considered the issue, *see id.* at 1261-63 and cases there cited, and noting that plaintiffs had not shown any intent to discriminate. Judge Newman granted summary

[2]The Uniform Guidelines on Employee Selection Procedures adopted by the EEOC in 1978 provide in pertinent part:

> If...the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If...the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection.
>
> ....
>
> A selection rate for any race, sex, or ethnic group which is less than four-fifths...of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

29 C.F.R. §§ 1607.4C and D (1979).

As the Supreme Court noted in Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975),

> The EEOC Guidelines are not administrative "regulations" promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute "[t]he administrative interpretation of the Act by the enforcing agency," and consequently they are "entitled to great deference." Griggs v. Duke Power Co., 401 U.S., at 433-434.

judgment for the defendants. *Id.* at 1263, 1265. Here the promotion rate for Blacks was over 160% of the rate for Whites, and evidence of discriminatory motive was wholly absent. Accordingly, plaintiffs' Title VII claim must fail.

Since Title VII principles govern claims of discrimination in employment under 42 U.S.C. § 1981, *Davis* v. *County of Los Angeles,* 566 F.2d 1334, 1340 (9th Cir. 1977), *vacated as moot,* 440 U.S. 625 (1979); *Brown, supra,* 474 F. Supp. at 1264, plaintiffs' § 1981 claim also must fail. Liability under § 1983 for a violation of the Equal Protection Clause depends upon proof of discriminatory intent or purpose. *Village of Arlington Heights* v. *Metropolitan Housing Development,* 429 U.S. 252 (1977); *Members of the Bridgeport Housing Authority Police Force* v. *City of Bridgeport,* 85 F.R.D. 624, 644 (1980). As noted above, proof of such intent is absent in this case, and plaintiffs' § 1983 equal protection claim accordingly must fail.

Plaintiffs' § 1983 due process claim[3] is similarly without merit. Plaintiffs received provisional promotions, and took the examination in question in order to qualify for permanent appointment to a higher position. Since their appointments were provisional, they did not acquire a property interest in their new positions, *see Board of Regents* v. *Roth,* 408 U.S. 564 (1972), and consequently had no right for the Due Process Clause to protect.

[3]This and the claim under state law *infra* apparently are the only claims pressed by the four white plaintiffs.

Plaintiff Winnie Teal has alleged retaliatory termination for her filing of administrative charges of discrimination.[4] To establish a prima facie case of retaliation, a plaintiff must show (i) that he engaged in activities protected by Title VII with the alleged retaliator's knowledge; (ii) an employment action detrimental to persons engaged in protected activities; and (iii) "a causal connection between the first two elements, that is, a retaliatory motive playing a part in the adverse employment action." *Grant* v. *Bethlehem Steel Corp.*, No. 79-7842, slip op. at 3060 (2d Cir. May 22, 1980). Here the plaintiff has clearly established the first two elements. She filed state and federal administrative complaints regarding the examination in question and was terminated thereafter, but subsequently reinstated as a result of arbitration proceedings. The causal connection can be established indirectly, for purposes of the prima facie case, by showing that the discriminatory treatment followed the protected activity. *Id.* Ms. Teal thus has established the third element as well. Defendants, however, have effectively rebutted plaintiff's prima facie case by showing that their alleged act of reprisal, plaintiff's termination, was based on the wholly independent ground that they suspected plaintiff of fraud in the performance of her duties. Plaintiff has not demonstrated that this reason was "a mere pretext for discrimination...."

Plaintiffs claim that defendants' conduct in the development and use of the examination in question violated Conn. Gen. Stat. § 5-219. That section provides in pertinent part:

[4]Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

> Examinations [for state employees] shall...fairly test and determine qualifications, fitness and ability of the persons tested to perform the duties of the class or position to which they seek appointment. Examinations shall be formulated in cooperation with agencies appointing specific classes of employees and shall be competitive.... Examinations may take the form of written or oral tests, demonstration of skill or physical ability, experience and training evaluation, or in the case of promotional examinations, evaluation of prior performance, or any other examination devices deemed appropriate to measure the knowledge, skill or ability required to perform the duties of the job.

Plaintiffs have pointed to no authority for their position that this section imposes a greater burden on the state than does Title VII, and this Court is aware of none. The language of the statute appears to suggest that the job-relatedness of the examination is to be determined, at least in the first instance, by the appointing agency (in this case the Department of Income Maintenance) and the Department of Administrative Services. Here both those agencies expended great time and effort to ensure the fairness of the examination, and both "deemed [the result] appropriate to measure the knowledge, skill or ability required to perform the duties of the job" in question.

The defendants did in fact perform a validation study of the examination, upon which they based their conclusions as to its appropriateness. The study may not meet the standards prescribed by the EEOC Guidelines, *see* 29 C.F.R. § 1607.14. But as noted above, there is no need to reach that question in the context of the Title VII analysis since plaintiffs have not shown adverse impact; and there is nothing in the language of the state statute to suggest that the state legislature contemplated any sort of validation study, much less the rigorous inquiry recommended by the Guidelines. Plaintiffs' claim under Conn. Gen. Stat. § 5-219 consequently is without merit.

For the foregoing reasons, judgment shall enter for the defendants.

It is SO ORDERED.

Dated at Bridgeport, Connecticut this 31st day of July, 1980.

/s/T. F. Gilroy Daly
T. F. Gilroy Daly
United States District Judge.

Office - Supreme Court, U.S.
FILED
DEC 4 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-2147

In The

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; AND EDWARD W. MAHER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY,

Petitioners,

V.

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK AND LINDA BROOKS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed on June 18, 1981
Certiorari Granted on October 5, 1981

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5. Judgment of the U.S. Court of Appeals for the Second Circuit	1a
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RELEVANT DOCKET ENTRIES

April 6, 1979	- Complaint filed at Bridgeport
May 16. 1979	- Calendar re: Motion for Preliminary Injunction marked OVER without date. Daly, J.
May 5, 1980	- Amended Complaint filed
May 13, 1980	- Answer filed by defendants
May 27, 1980	- Hearing held before Daly, J.
May 28, 1980	- Court trial continues; both sides rest; decision reserved
July 31, 1980	- Memorandum of decision filed and entered
August 5, 1980	- Judgment for the defendants filed and entered
August 8, 1980	- Plaintiffs' Notice of Appeal from judgment to the U.S. Court of Appeals for the Second Circuit filed
December 22, 1980	- Argument before Court of Appeals
March 26, 1981	- Opinion of Court of Appeals filed and entered
March 26, 1981	- Judgment of Court of Appeals reversing the judgment of the District Court and remanding for further proceedings filed and entered

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

WINNIE TEAL, DAVID MALSTROM, MARION COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK AND LINDA BROOKS	)	
Plaintiffs	)	
VS.	)	CIVIL ACTION NO. B - 79-128
STATE OF CONNECTICUT DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT: DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT: ELISHA C. FREEDMAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY: AND EDWARD W. MAHER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY,	)	APRIL 24, 1980
Defendants	)	

AMENDED COMPLAINT

PRELIMINARY STATEMENT

1. The plaintiffs bring this action for equitable relief. Plaintiffs Winnie Teal, Rose Walker, Edith Latney and Gracie Clack, seek redress for injuries suffered because the defendants are partaking in practices which discriminate against the plaintiffs, Winnie Teal, Gracie Clack, Rose Walker and Edith Latney, on the basis of race and color in the opportunities for and the terms and conditions of employment, including pay and promotion. The plaintiffs, David Malstrom, Marian Costa, Jennie Pick and Linda Brooks, seek redress for injuries suffered because the

defendants' practices have denied to them equal protection of the laws.

JURISDICTION

2. This action is brought pursuant to Title 42 U.S.C. Section 1981 and 1983 and Title 42 U.S.C. 2000e et seq. Jurisdiction is conferred on this Court by Title 28 U.S.C., Section 1343(3) and (4) and by Title 42 U.S.C., Section 2000e-5(f).

PARTIES

3. Plaintiff, Winnie Teal, is a black citizen of the United States and a resident of the City of Stamford, State of Connecticut, and is employed in the Department of Income Maintenance of the State of Connecticut.

4. Plaintiff, David Malstrom, is a citizen of the United States and a resident of the City of Hartford, State of Connecticut, and is employed in the Department of Income Maintenance of the State of Connecticut.

5. Plaintiff, Marian Costa, is a citizen of the United States and a resident of the Town of Cromwell, State of Connecticut, and is employed in the Department of Maintenance of the State of Connecticut.

6. Plaintiff, Rose Walker, is a black citizen of the United States and a resident of the Town of Bloomfield, State of Connecticut, and is employed in the Department of Income Maintenance.

7. Plaintiff, Edith Latney, is a black citizen of the United States and a resident of the City of Hartford, State of Connecticut, and is employed in the Department of Income Maintenance.

8. Plaintiff, Gracie Clack, is a black citizen of the United States and a resident of the City of Bridgeport, State of Connec-

ticut, and is employed in the Department of Income Maintenance.

9. Plaintiff, Jennie Pick, is a citizen of the United States and a resident of New Britain, Connecticut and is employed in the Department of Income Maintenance.

10. Plaintiff, Linda Brooks, is a citizen of the United States and a resident of East Hartford, Connecticut and is employed in the Department of Income Maintenance.

11. Defendant, State of Connecticut, is one of the states of the United States.

12. Defendant, Department of Administrative Services of the State of Connecticut, is an agency of the State of Connecticut, charged with the responsibility of and administering the process of filling employment positions within the government of the State of Connecticut.

13. Defendant, Department of Income Maintenance, is an agency of the State of Connecticut for whom the plaintiffs are employed.

14. Defendant, Elisha C. Freedman, is a citizen of the United States and a resident of the State of Connecticut, and is the Commissioner of the Department of Administrative Services.

15. Defendant, Edward W. Maher, is a citizen of the United States and a resident of the State of Connecticut, and is the Commissioner of the Department of Income Maintenance.

16. All defendant officials of the State of Connecticut are sued both individually and in their official capacity.

FACTS GIVING RISE TO CAUSES OF ACTION OF PLAINTIFFS WINNIE TEAL, ROSE WALKER, GRACIE CLACK AND EDITH LATNEY

17. On December 2, 1978, plaintiffs, Winnie Teal, Gracie Clack, Rose Walker and Edith Latney took an examination given by the Department of Administrative Services of the State of Connecticut for promotion to the position of Eligibility Technician Supervisor in the Department of Income Maintenance.

18. The examination results were made known on or about March 15, 1979.

19. Said examination discriminated against blacks in that a disproportionate number of black candidates were excluded in the promotional process as a result of said examination, and in that the examination did not reflect adequately the candidates' ability to perform the jobs in question.

20. Said examination has not been properly validated.

21. The defendants knew or should have known that said examination, would discriminatorily exclude black applicants for promotion.

22. Although Plaintiffs, Winnie Teal, Gracie Clack, Rose Walker and Edith Latney, have been employed by the Department of Income Maintenance for a period of up to 12 years and during that period of time have been assigned to jobs which required as much training and ability as the job performed by an Eligibility Technician Supervisor, and in fact have been successfully serving for over a year in that position, they were eliminated from consideration for permanent promotion to the job of Eligibility Technician Supervisor based on a test which did not predict accurately their performance on that job. In addition, the plaintiff, Winnie Teal, has in the past successfully competed on a test for this position, although she was not given permanent status.

23. As a result of the defendants' actions the plaintiffs will suffer the embarrassment and loss of dignity of being removed from the supervisory positions they are now holding, with a loss in their individual pride and monetarily in a reduction in pay and other benefits, including pension rights. Such injury is both immediate and irreparable, and is scheduled to occur on April 19, 1979.

FACTS GIVING RISE TO THE CAUSES OF ACTION OF THE PLAINTIFFS, DAVID MALSTROM, MARIAN COSTA, JENNIE PICK AND LINDA BROOKS

24. On December 2, 1978, plaintiffs, David Malstrom, Marian Costa, Jennie Pick and Linda Brooks, took an examination given by the Department of Administrative Services of the State of Connecticut for promotion to the position of Eligibility Technician Supervisor in the Department of Income Maintenance.

25. The examination results were made known on or about March 15, 1979.

26. The examination given on December 2, 1978, failed to test the qualifications, fitness and ability of the persons tested to perform the duties of the position of Eligibility Technician Supervisor.

27. Said examination has not been properly validated.

28. Although each of the plaintiffs have been serving successfully in the position of Welfare Technician Supervisor for over a year, they have been eliminated from consideration for permanent promotion to the position of Eligibility Technician Supervisor based on a test which did not predict accurately their performance in that position.

29. As a result of the defendants' actions the plaintiffs will suffer the embarrassment and loss of dignity by being removed from the supervisory positions they are now holding, with a loss

in their individual pride, and a loss monetarily by a reduction in pay and other benefits, including pension rights. Such injury is both immediate and irreparable and is scheduled to occur on April 19, 1979.

30. The actions of the defendants about which plaintiffs complain herein took place under color of state law.

31. The policies and practices alleged herein constitute violations of plaintiffs' rights, privileges and immunities secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and by Title 42 U.S.C. Section 1981 and 1983.

32. Plaintiffs Winnie Teal, Edith Latney, Gracie Clack and Rose Walker have fulfilled the jurisdictional preprequisites to suit under Title VII of the Civil Rights Act of 1964, as amended. They filed complaints with the Equal Employment Opportunity Commission, and on September 20, 1979, the United States Department of Justice issued Notices of Right to Sue within 90 days.

CAUSES OF ACTION AS TO PLAINTIFFS, GRACIE CLACK, ROSE WALKER, EDITH LATNEY AND WINNIE TEAL

33. The policies and practices alleged herein constitute violations of the plaintiffs' rights to equal employment opportunity guaranteed by Title 42 U.S.C. Section 2000e et seq.

34. The conduct of the defendants violates plaintiff Winnie Teal's rights under Title VII of the Civil Rights Act of 1964, and deprives her of equal employment opportunity in that the defendants have terminated her employment in retaliation for her filing a complaint with the Equal Employment Opportunity Commission.

CAUSES OF ACTION AS TO PLAINTIFFS, DAVID MALSTROM, MARIAN COSTA, GRACIE CLACK, ROSE WALKER, EDITH LATNEY, WINNIE TEAL, JENNIE PICK AND LINDA BROOKS

35. The practices of the defendants complained of arbitrarily and capriciously deprive plaintiffs, David Malstrom, Marian Costa, Gracie Clack, Rose Walker, Edith Latney, Winnie Teal, Jennie Pick, and Linda Brooks, the pay and opportunities for promotion which are available to those who have passed this non-job related examination. Accordingly, these practices violate Title 42 U.S.C. Section 1983, and the Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

36. The practices of the defendants complained of violate the provisions of Section 5-219 of the Connecticut General Statutes, Revision of 1958, as amended.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that the Court grant:

(a) Preliminary and permanent injunctions enjoining defendants, their agents and employees from denying plaintiffs employment and/or promotional opportunities on the bases of race and/or color, and further enjoining defendants, their agents and employees from discriminating against plaintiffs in terms and conditions of employment;

(b) Preliminary and permanent injunctions enjoining defendants, their agents and employees from using the results of the examination given on December 2, 1978, for making appointments to the position of Eligibility Technician Supervisor;

(c) Preliminary and permanent injunction enjoining defendants, their agents and employees from removing the plaintiffs from their positions as Eligibility Technician Supervisor;

(d) An order requiring the defendants to conduct another examination, which is not discriminatory, and which tests performance on the job, for the position of Eligibility Technician Supervisor;

(e) Costs;

(f) Attorneys' fees;

(g) Such other and further relief as the Court deems appropriate.

Dated at Bridgeport, Connecticut, this 24th day of April, 1980.

/s/Thomas W. Bucci
Thomas W. Bucci
Attorney for Plaintiffs
955 Main Street
P.O. Box 1438
Bridgeport, Connecticut 06601

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

WINNIE TEAL, DAVID MALSTROM, MARION COSTA, EDITH LETNEY, ROSE WALKER, GRACIE CLACK JENNIE PICK and LINDA BROOKS	)	
Plaintiffs	)	
VS.	)	CIVIL ACTION NO. B-79-128
STATE OF CONNECTICUT DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT: DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT: ELISHA C. FREEDMAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY: AND EDWARD W. MAHER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY,	)	May 8, 1980
Defendants	)	

ANSWER

1. Paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 24 and 25 of the plaintiff's complaint are admitted.

2. Paragraphs 1, 2, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 35 and 36 of the plaintiff's complaint are denied.

DEFENDANTS

BY: CARL R. AJELLO
ATTORNEY GENERAL

/s/Sidney D. Giber
SIDNEY D. GIBER
Assistant Attorney General
P.O. Box 120
Hartford, Connecticut

I hereby certify that a
copy of the above was
mailed to all counsel
of record on May 8, 1980

/s/Sidney D. Giber
Sidney D. Giber
Assistant Attorney General

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

NOTICE OF APPEAL	CIVIL NO. B-79-128

PLAINTIFFS,
WINNIE TEAL, DAVID MALMSTROM, MARION COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK and LINDA BROOKS

VS

DEFENDANTS,
STATE OF CONNECTICUT: DEPARTMENT OF ADMINISTRATIVE SERVICES of the State of Connecticut; DEPARTMENT OF INCOME MAINTENANCE of the State of Connecticut; ELISHA C. FREEDMAN, Individually and in his official capacity, and EDWARD W. MAHER, Individually and in his official capacity

Notice is hereby given that Winnie Teal, David Malmstrom, Marion Costa, Edith Latney, Rose Walker, Gracie Clack and Jennie Pick, the foregoing named plaintiffs, hereby appeal to the United States Court of Appeals for the Second Circuit from the Final Judgment of the Court entered in this action on the 5th day of August, 1980.

THE NAMED PLAINTIFFS

By /s/Thomas W. Bucci
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August 8, 1980

Office-Supreme Court, U.S.
FILED
JUL 13 1981
ALEXANDER L. STEVAS, CLERK

80-2147

No.

In The

Supreme Court of the United States

October Term, 1980

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually and In His Official Capacity; and EDWARD W. MAHER, Individually and in His Official Capacity,
Petitioners,

vs.

WINNIE TEAL, DAVID MALMSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK and LINDA BROOKS,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Where selections for promotion are made from a pool of eligible candidates, whether a black plaintiff in an action brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, may make a prima facie showing of employment discrimination under a disparate impact analysis by establishing (1) that entry into the promotional eligibility pool is dependent solely upon passing a promotional examination; and (2) that the examination disproportionately excludes black candidates, including the plaintiff from the eligibility pool, even though final selections from the pool of eligibles generated by the examination do not evidence disparate results.

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Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

This case involves a Title VII challenge to an employment test developed and used by the State of Connecticut to determine eligibility for promotion to the position of Welfare Eligibility Supervisor within the Department of Income Maintenance of the State of Connecticut. At the outset, it should be emphasized that this is not a case involving an examination process consisting of various sub-tests or components. To the contrary, the examination process employed by the State of Connecticut to determine eligibility for appointment consisted of a single component, the test in question. Thus, the present case does not present the question of whether a plaintiff is able to establish a Title VII prima facie case of discrimination under a disparate impact theory by proving that one component or sub-test of an examination made up of various subtests or components has an adverse impact, where the results of the overall examination process fails to evidence an adverse impact. Instead, this case presents the question of whether a plaintiff is able to establish a Title VII prima facie case of race discrimination under a disparate impact analysis based upon the admittedly disparate results of an examination process, composed of a single test, that excluded a disproportionate number of black candidates from qualifying for promotion, where the actual selections made from the pool of successful candidates does not yield disparate results.

As the facts of the present case reveal, the plaintiffs, Winnie Teal, Rose Walker, Edith Latney and Gracie Clark, are black American citizens employed by the State of Connecticut, Department of Income Maintenance. Several of the plaintiffs' supervisors testified at trial that the plaintiffs possessed the qualifications for permanent positions as supervisors and praised their performance on the job.

Eligibility for appointment on a permanent basis was determined on the basis of the results of a written examination. Those candidates who passed the written examination formed an eligibility pool from which the State was allowed in its discre-

tion, to select persons to fill the permanent positions. Only if a candidate passed the written examination was he considered eligible for promotion on a permanent basis. Those candidates who failed to attain a passing grade on the test were eliminated from all consideration for promotion.

The written test was administered on December 2, 1978 to 329 candidates. The mean score on the test was 70.4 percent. The black candidates, however, had a mean score of 6.7 percentage points lower than the white candidates, a disparity that the defendants admitted was statistically significant. It was only after the test was corrected that a passing point was set by the State. Knowing full well that a cut-off score of 65 would eliminate from eligibility a disproportionately large number of black candidates, including the plaintiffs, the State, nevertheless, set the passing score at 65. With the passing score set at 65, the following results were obtained:

Candidate Group	Number	Number Receiving Passing Score	Passing Ratio (%)
Black	48	26	54.17
Hispanic	4	3	75.00
Indian	3	2	66.67
White	259	206	79.53
Unidentified	15	9	60.00
Total	329	246	74.77

The above table reveals that the passing rate of the identified black candidates (54.17%) was approximately 68 percent that of the passing rate of the identified white candidates (79.53%). All four of the plaintiffs received a score on the written examination lower than 65. This disparity in the passing rates between black candidates and white candidates was labeled by the State's own expert witness as statistically significant. In addition, a comparison of the pass rates between black candidates and white candidates established that it contravened the four-fifths rule of the Uniform Guidelines on Employee Selection

Procedures prepared by the Equal Employment Opportunity Commission, 29 C.F.R. Section 1607.4(d) (1979). The plaintiffs were thus denied promotional consideration due solely to the fact that they failed to attain a passing grade on an examination that admittedly had a disparate impact on black candidates. Faced with these results, the plaintiffs instituted this action claiming that the written examination discriminated against them on account of their race in violation of Title VII.

As previously discussed, candidates who failed to achieve a passing grade on the examination were eliminated from all consideration for appointment. Those who passed the examination were ranked on an eligibility list in order of their test scores. All candidates achieving the same test score were assigned an identical ranking. The scores of the 246 candidates who passed the examination were grouped into 25 separate rankings.

In filling vacancies, the State's merit system allows the State to make appointments from any of the candidates whose scores fall within a given number of rankings. The number of rankings from which the State is allowed to choose candidates for appointment is determined by taking the number corresponding to the number of vacancies and adding four to it. Selection of candidates from these rankings need not be made in any particular order.

Thus, in the present case, since there were 46 vacancies to be filled, the State, theoretically, could have chosen for promotion any candidate whose name appeared within the 50 highest rankings. However, since the scores of all 246 passing candidates fell within 25 separate rankings, the State, in its discretion, was permitted to choose for promotion from any of the passing candidates regardless of their rank order. Hence, again as acknowledged by the State, the results of the examination were, in fact, used on a pass-fail basis. Those candidates who passed the test were all eligible for promotion on an equal basis, while those who failed were eliminated from any consideration.

More than a year after this action was instituted, and approximately one month prior to trial, the defendants made their first promotions from the eligibility list generated by the written examination. Forty-six persons were promoted to permanent supervisory positions, eleven of whom were black and thirty-five of whom were white. Of the forty-eight identified black candidates who entered the selection process, eleven, or approximately 23 percent were promoted; of the 259 identified white candidates who applied, thirty-five, or about 13.5 percent were promoted. Thus the actual promotion rate of blacks (23 percent) was approximately 170 percent that of the actual promotion rate (13.5 percent) of identified whites.

REASONS FOR DENYING CERTIORARI

I.

The defendants in their petition for certiorari argue that the United States Court of Appeals for the Second Circuit erred in holding that, under Title VII of the Civil Rights Act of 1964, as amended, 42 USC Section 2000e et seq.

> "[w]here a plaintiff establishes that a component of a selection process produced disparate results *and* constituted a pass-fail barrier beyond which the complaining candidates were not permitted to proceed, a prima facie case of disparate impact is established, notwithstanding that the entire selection procedure did not yield disparate results." *Teal* v. *Connecticut,* No. 80-7675, slip op. at 2103, 2105 (2d Cir. Mar. 26, 1981)

No claim of error is made as to the factual findings relied upon by the Court of Appeals in reaching its decision. The defendants do not dispute that the examination eliminated a disproportionately large number of black candidates, including the plaintiffs, from consideration for promotion. Nor do the defendants dispute that the test constituted a pass-fail barrier beyond which the plaintiffs were not allowed to proceed. That the plaintiffs were excluded from consideration for promotion solely on the basis of an examination that produced discriminatory results is beyond question.

The defendants contend that regardless of these facts the plaintiffs failed to establish a prima facie case of race discrimination under Title VII because, from the pool of candidates who passed the examination, the State selected for permanent appointments a disproportionately large number of black candidates. In other words, the State claims that even though the composition of the eligibility pool may have been the result of a discriminatory examination, the plaintiffs are without redress under Title VII because the final selections made by the State

from that discriminatory eligibility pool did not adversely impact against black candidates.

This argument, as the Court of Appeals held, completely overlooks the discrimination suffered by the plaintiffs in being excluded from the eligibility pool solely on the basis of the results of the examination.

> "In the case at bar, an employee selection device produced a readily discernible disparate impact upon the black candidates. The affirmative action effort taken by the defendants at the end of the process was 'of little comfort to the candidates who were not permitted to proceed beyond the allegedly discriminatory pass-fail barrier."
>
> "Title VII was designed to protect the rights of individuals. 'It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race...' *Furnco Construction Corp.* v. *Waters,* supra, 438 U.S. at 579. 'A primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees...An equally important purpose of the Act is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.' *International Brotherhood of Teamsters* v. *United States,* supra, 431 U.S. at 364. Permitting the overall selection process result in this case to validate what may be the denial of the employment opportunity to a disproportionate number of black candidates is an expedient that transgresses the purpose of Title VII. Where an employment practice forecloses a disproportionate number of persons in a protected group from a job opportunity, it matters very little to the victimized individuals that their group as a whole is well represented in the group of hirees. '[G]ood intent or absence of discriminatory intent

> does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.' *Griggs* v. *Duke Power Co.*, supra, 401 U.S. at 432" *Teal* v. *Connecticut*, supra at 2116, 2117

The defendants claim that the Court of Appeals decided this issue in a way contrary to the interpretation of Title VII by the Supreme Court in other cases. It claims that its position on this issue correctly adheres to prior Supreme Court decisions. To the contrary, the ruling of the Court of Appeals and the rationale supporting it are firmly grounded in prior Supreme Court decisions.

Commencing with its decision in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971), the Supreme Court has been consistent in holding that employment devices that disproportionately *"exclude"* minority applicants from employment opportunities are presumptively violative of Title VII unless such practices are shown to bear a demonstrable relationship to successful performance of the job for which they are used.

In *Griggs* v. *Duke Power Company*, supra, at p. 431, the Supreme Court held that employment practices which operated to exclude Negroes from employment opportunities were prohibited by Title VII unless shown to be job-related in the following words:

> "Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has — to resort again to the fable — provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If

> an employment practice *which operates to exclude* Negroes cannot be shown to be related to job performance, the practice is prohibited. *Griggs* v. *Duke Power Company,* supra, at p. 431. (Emphasis supplied)

The Court used the following language in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802, fn. 14 (1973) in addressing the question of what devices may properly be used to test qualifications for employment:

> "We note that the issue of what may properly be used to test qualifications for employment is not present in this case. Where employers have instituted employment tests and qualifications with an *exclusionary effect* on minority applicants, such requirements must be 'shown to bear a demonstrable relationship to successful performance of the jobs' for which they were used..." (citations omitted.) (emphasis supplied)

The Court went on to explain its holding in *Griggs,* supra

> "But Griggs differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, *operated to exclude many blacks who were capable of performing effectively in the desired positions.* Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives..." *McDonnell Douglas Corp.* v. *Green,* supra at 806 (Emphasis supplied)

And again in *International Brotherhood of Teamsters* v. *United States,* 341 U.S. 324, 348, 349,

> "[t]he primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have

> fostered racially stratified job environments to the disadvantage of minority citizens'...To achieve this purpose, Congress 'proscribe[d] not only overt discrimination but also practices that are fair in for *but discriminatory in operation*'...Thus, the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group..." (Citations omitted)

See also the concurring opinion of Justice Marshall in *Furnco Const. Corp.* v. *Waters,* 438 U.S. 567, 583, (1978):

> "Where the Title VII claim is that a facially neutral employment practice actually falls more harshly on one racial group, thus having a disparate impact on that group, our cases establish a different way of proving the claim...As set out by the Court in *Griggs* v. *Duke Power Company,* supra, to establish a prima facie case on a disparate impact claim, a plaintiff need not show that the employer had a discriminatory intent but need only demonstrate that a particular practice in actuality 'operated to exclude Negroes'..." (citations omitted)

See also the dissenting opinion of Justice White in *New York City Transit Authority* v. *Beazer,* supra, at p. 598:

> "In a disparate impact hiring case such as this, the plaintiff must show that *the challenged practice excludes members of a protected group* in numbers disproportionate to their incidence in the pool of potential employees..." (emphasis supplied)

And in *Dothard* v. *Rawlinson,* 433 U.S. 321 (1977) the Supreme Court ruled that the statutory height weight requirements for employment as a correctional counselor with the Alabama Board of Corrections was violative of Title VII in that

these requirements worked disproportionately to exclude women from eligibility for employment. Although these facially neutral employment standards were but two of various eligibility requirements, id at p. 327, the Court focused on the exclusionary effects of the height and weight requirements in ruling that they were violative of Title VII.

> "The gist of the claim that the statutory height and weight requirements discriminate against women does not involve an assertion of purposeful discriminatory motive. It is asserted, rather, that these facially neutral qualification standards work in fact disproportionately to exclude women from eligibility for employment by the Alabama Board of Corrections." *Dothard* v. *Rawlinson,* supra at p. 328, 329.

As in the present case, the facially neutral qualification standards in *Dothard* constituted a pass-fail barrier which disproportionately excluded members of a protected class from eligibility for employment. The controlling statistics were those that demonstrated the disproportionate exclusion of women from eligibility for employment. Similarly, in the present case, the controlling statistics are those that demonstrate the disproportionate exclusion of black candidates from eligibility for promotion. Once the plaintiffs established this disproportionate effects, a prima facie case of employment discrimination is proved and it becomes the defendants burden to prove business necessity. *Dothard* v. *Rawlinson,* supra.

That the defendants, in making the promotions they have to date, appointed a greater percentage of black candidates who passed the test than their incidence in the eligibility pool would statistically command, does not negate the fact that the testing device being the sole criteria for determining eligibility for promotion, disproportionately excluded black candidates from having an opportunity to be promoted. More specifically, the fact that more fortunate black candidates passed the test and received promotions does not alter the consequences that the

examination, which disproportionately excluded black applicants, had on the black plaintiffs in the present case.

The language employed in *Furnco Constr. Corp.* v. *Waters,* supra at p. 579, although a "disparate treatment" case, is equally applicable to the present case.

> "...it is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force..."

The fact that other more fortunate members of their race overcame the discriminatory screening device does not remedy the discrimination they suffered.

II.

The position espoused by the defendants also runs counter to the fundamental principle underlying Title VII, equality of treatment for individuals.

> "The statute makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions or privileges of employment, because of such *individual's* race, color, religion, sex or national origin.' 42 U.S.C. Section 2000e-2(a) (1) (emphasis added) The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class..."

> "Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes..." *City of Los Angeles* v. *Manhart,* 435 U.S. 702, 709, (1978)

The language of the Court of Appeals takes cognizance of Title VII's focus on the individual.

> "Where, however, an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process, a different result must obtain. Otherwise we would be adopting the position that regardless of the language of the statute Congress intended Title VII to protect faceless groups rather than individuals. Title VII cannot be interpreted to permit an obvious denial of employment opportunities to candidates that is solely attributable to non-job-related characteristics they possess that are inherent to their race." *Teal* v. *Connecticut,* supra, 2112, 2113.

> "Permitting the overall selection process result in this case to validate what may be the denial of an employment opportunity to a disproportionate number of black candidates is an expedient that transgresses the purpose of Title VII. Where an employment practice forecloses a disproportionate number of persons in a protected group from a job opportunity, it matters very little to the victimized individuals that their group as a whole is well represented in the group of hirees." *Teal* v. *Connecticut,* supra, 2117

III.

In further support of their petition for certiorari, the defendants claim that there exists a conflict among the Courts of Appeal of the various circuits on this issue. However, as discussed below, the decision of the present case is in harmony with the holdings of the various decisions cited by the defendants.

The first case cited by the defendants, *EEOC* v. *Greyhound Lines,* 635 F2d 188 (3d Cir. 1980), did not involve an employ-

ment test, but concerned a "no beard" policy. Initially, the Court seriously questioned the efficacy of assessing the claim of discrimination presented in that case under a disparate impact theory, id at p. 190, fn. 3, and then proceeded to hold that the plaintiff did not sustain its burden of proving its case because of its failure to introduce evidence establishing the disproportionate impact of the no beard policy on black males, id at p. 191 and 192, fn. 5.

Where, however, as in the instant case, there is a readily discernible group of employees who have been subjected to a readily identifiable employment practice and the impact of that practice on the protected class has been demonstrated through the introduction of competent evidence, a prima facie case would be established under *EEOC* v. *Greyhound,* supra.

The holding of the second case cited by the defendant, *Friend* v. *Leidinger,* 588 F2d 61 (4th Cir. 1978) must be read in conjunction with *U.S.* v. *County of Fairfax, VA,* 629 F2d 932 (4th Cir. 1980). In the latter case, a case similar to the present one, the Court explicitly declined to rule on the theoretical validity of the so-called "bottom line" defense.

> "[W]e do not address the County's 'bottom line' defense, by which it contends that sufficient numbers of blacks were hired even if the employment tests, which allegedly constitute only a part of the hiring process, were discriminatory. *We pass no judgment on the theoretical validity of this defense..." U.S.* v. *County of Fairfax, VA,* supra, fn. 13.

Thus, contrary to the defendants' contention, the fourth circuit has taken no position on the theoretical validity of the bottom line defense advanced by the defendants in the instant case. Instead, it has held in *Friend* v. *Leidinger,* supra only that an examination is not to be fractured into its component subtests, a situation not present in the matter now before the Court which concerns an examination with but a single component.

Similarly, the decision of *EEOC* v. *Navajo Refining Co.*, 593 F2d 988 (10th Cir. 1979) and *Smith* v. *Troyan*, 520 F2d 492 (6th Cir. 1975) cert. denied, 426 U.S. 934 (1976) are not inconsistent with the case at bar. In the latter case, a disparate impact case, the sixth circuit rejected a plaintiff's attempt to fragment an examination process in an effort to challenge one subtest, a written "General Classification Test." In that case, the examination was made up of various subtests that did not act as individual pass-fail barriers, but instead the scores on the subtests were cumulative, giving rise to one overall passing score. See *Teal* v. *Connecticut*, supra at p. 2111, 2112.

Likewise, in *EEOC* v. *Navajo Refining Co.*, supra, the employer required a high school diploma or G E D equivalent and a minimum score on an aptitude test as prerequisites for entry-level employment. Fewer Spanish surnamed Americans than "Anglos" met these requirements but Navajo used statistical adjustments to equalize the scores of the different groups. The tenth circuit's decision rejecting plaintiff's attack on the test also is in harmony with the holding of the instant case.

> "Since *all* of the candidates in such a process would have been afforded the opportunity to receive the benefit of the offsetting mechanism...the overall results of the process should be deemed a fair barometer of the fairness of the process." *Teal* v. *Connecticut*, supra at p. 2115.

IV.

Finally, the defendants claim that employers, who have no intent to discriminate, need guidance from the Supreme Court as to whether they are to be subject to the necessity of establishing the validity of their tests under the facts of the present case. However, the Supreme Court has consistently ruled that under a disparate impact theory proof of discriminatory motive is not required. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), *Albermarle* v. *Moody*, 422 U.S. 405 (1975); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324

(1977); *Dothard* v. *Rawlinson,* 433 U.S. 321 (1977), and that once the adverse impact of the test is demonstrated, the employer must meet the burden of showing the test bears a manifest relation to the employment in question. *Griggs,* supra; *Dothard* v. *Rawlinson,* supra.

Conclusion

For all the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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NO. 80-2147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually And In His Official Capacity; AND EDWARD W. MAHER, Individually And In His Official Capacity,
Petitioners,

V.

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK AND LINDA BROOKS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petition for Certiorari Filed on June 18, 1981
Certiorari Granted on October 5, 1981

QUESTION PRESENTED

In a Title VII disparate impact case, have the respondents made a prima facie case of employment discrimination against the State of Connecticut by merely establishing (1) that they failed to succeed on a component of the selection process and thereby became ineligible to proceed further in the selection process, and (2) that the statistical results of such component, taken in isolation, had an adverse impact on respondents' minority group, when the respondents have not established that the appointments made as a result of the entire selection process have had an adverse impact on respondents' minority group?

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NO. 80-2147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CONNECTICUT, *et al.*
Petitioners,

V.

WINNIE TEAL, *et al.*
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the District of Connecticut has not been officially reported. The Court's Memorandum of Decision is printed in the Appendix to the Petition for Writ of Certiorari (hereinafter "App. to Pet.") at pp. 18a-27a. The opinion of the Court of Appeals for the Second Circuit is reported at 645 F.2d 133 (2d Cir. 1981). The Court's slip opinion is printed in the Appendix to the Petition at pp. 2a-16a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made and entered on March 26, 1981. (App. to Pet., p. la). The jurisdiction of the Court was invoked under 28 U.S.C. § 1254 (1) when the petitioners filed their petition for a writ of certiorari on June 18, 1981; the petition was granted on October 5, 1981. The jurisdiction of the District Court to hear the issues material to this petition was invoked under § 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5. See Memorandum of Decision (App. to Pet., p. 19a).

STATUTES INVOLVED

The principal statute involved is § 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 (1976). The pertinent parts are set forth below:

> (a) it shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> * * *

> (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. . . .

The petitioners' brief also contains references to several provisions of the Connecticut General Statutes, specifically § 422d(1937 Supp.) and §§ 5-193 — 5-195, 5-196(e) and (k), 5-198, 5-216 — 5-230, 5-272(d), 46a-68 — 46a-70. All state statutes cited in this brief are printed in sequential order in the Appendix to this brief.

STATEMENT OF THE CASE

Four respondents, Winnie Teal, Rose Walker, Edith Latney and Gracie Clack, who were plaintiffs below, are black employees of the Department of Income Maintenance of the State of Connecticut. Serving provisionally in positions in the classification of Welfare Eligibility Supervisor, they sought permanent promotional appointments to positions in that class. This required that they compete with other departmental employees in a merit selection process. The merit selection process involved a written examination and the selection by the appointing authority of appointees from a list of the persons who passed the examination. The selection of appointees from the list was made on considerations such as rank on the list, supervisory recom-

mendations, job performance, and interest in service in the geographical area where the vacancies existed.[1]

The four black respondents, along with the other four respondents who are white, and 321 others, took the examination on December 2, 1978.[2] The results were announced on March 15, 1979. All eight failed the examination. Of the 329 examinees, 48 identified themselves as black. The 26 blacks who passed the examination comprised 54.17 percent of the blacks who took the examination. The highest pass rate was among the 259 persons who identified themselves as white. Of these, 206, or 79.53 percent, passed. The examination pass rate for black candidates was approximately 68 percent of the examination pass rate for white candidates.

---

[1]The Court of Appeals stated that as part of the final phase of the selection process, the petitioners employ an affirmative action program "to insure a large representation of minority candidates on the supervisory level." *Teal v. Connecticut,* 645 F.2d 133, 135 (2d Cir. 1981) (App. to Pet., p. 7a). The District Court made no finding regarding affirmative action in the selection of promotees from the list, nor was there any evidence at trial about the nature of any affirmative action program. While each state agency is required to develop an affirmative action plan (Conn. Gen. Stat. § 46a-68), such a plan is geared to assuring continuance of the State's long-standing commitment to non-discrimination and to equal employment opportunities. Conn. Gen. Stat. §§ 46a-69 - 46a-70. These plans are not based upon any history of past discrimination and therefore do not contain quotas to correct such wrongs. See *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979). In the absence of any contrary findings by the District Court, the trier of fact, it must be presumed that the successful candidates were promoted "...on the basis of merit and qualifications, without regard for race...[or] color" as required even by affirmative action law. Conn. Gen. Stat. § 46a-70(a). Any speculation about affirmative action in the selection of promotees will only obscure the issues presented herein.

[2]The issues presented by the petition directly pertain only to black respondents. The use of the term "respondents" will apply to them unless indicated otherwise.

The respondents commenced their suit on April 6, 1979, almost immediately after the certification of the promotion list but before the selection process had progressed to the point of making promotions from the list.

By the time of trial all blacks, who comprised 22.91 percent of the black candidates who took the examination, had received promotions to Welfare Eligibility Supervisor, while 35 whites, who comprised 13.51 percent of the whites who took the examination had received such promotions.[3] Thus the success rate among blacks who entered the selection process was 169.5 percent of the whites' success rate at the time of trial. Further promotions remained to be made from the promotional list, at least 12 to 15 more, including the eight vacancies being held for the respondents.

The District Court, in evaluating the selection process for adverse impact, used the "eighty percent rule" of the Uniform Guidelines on Employee Selection Procedures adopted by the Equal Employment Opportunity Commission (hereinafter "The Uniform Guidelines"). 29 CFR § 1607.4D (1979). Under the four-fifths rule, "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally

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[3]The Court of Appeals noted that no promotions were made until eleven months after the promulgation of the promotional list and only a month before trial. *Teal v. Connecticut, supra,* 645 F.2d at 136 (App. to Pet., p. 9a). Almost immediately after commencement of the suit respondents sought a preliminary injunction; this motion was not acted upon when the petitioners in a chambers conference agreed to delay promotions until trial on the merits. Docket entry for May 16, 1979 (J.A. 2). When the workload of the Department of Income Maintenance necessitated the appointment of supervisory personnel without delay, the petitioners made these promotions while agreeing to hold eight vacancies for the respondents, pending the outcome of the litigation.

be regarded . . . as evidence of adverse impact."[4] *Ibid.* Since the black selection rate (22.91 percent) was higher than the white selection rate (13.51 percent), the District Court found no adverse impact. No evidence of discriminatory intent having been presented,[5] the District Court ruled against the respondents on their Title VII claim. Memorandum of Decision of District Court (App. to Pet., p. 24a).

The District Court, on similar reasoning, denied the claim of the four black respondents under § 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1976). *Ibid.* The claims of all eight respondents under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976), were also dismissed. On the § 1983 equal protection claims, the Court found a lack of proof of intent to discriminate, and on the due process claims the Court found the absence of a property interest. *Ibid.*

All eight respondents also made a pendent claim that the written test violated Conn. Gen. Stat. § 5-219, which requires that examinations for state employees "fairly test and determine the qualifications, fitness and ability of the persons tested to perform the duties of the class or position to which they seek appointment." The District Court found this claim to be without merit. *Ibid.* (App. to Pet., p. 26a).

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[4]The position of petitioners should not be construed as conceding the validity of the "eighty percent rule" as a valid measure of adverse impact. The eighty percent rule is a "rule of thumb." It "is not intended as a legal definition." Question and Answer No. 11, "Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures." 44 Fed. Reg. 11996, 11998 (1979); see also *Rich v. Martin Marietta Corp.*, 467 F.Supp. 587, 611 (D.Colo. 1979). The issue is not present in this proceeding.

[5]In their amended complaint, the subject respondents alleged that the petitioners' use of the examination constituted intentional discrimination. Amended Complaint, ¶ 21 (J.A. 6).

The respondents appealed to the Court of Appeals two of the District Court's rulings, the one on the Title VII issue and the one on the pendent claim.

The Court of Appeals reversed the District Court on the Title VII issue, holding that the examination itself must be assessed for adverse impact, because it constituted a pass/fail barrier beyond which the black respondents, having failed it, were not allowed to proceed. Since the examination results, considered by themselves, had an adverse impact on blacks, a prima facie case of employment discrimination was established, notwithstanding the fact that the results of the overall selection procedure produced no adverse impact on blacks. *Teal v. Connecticut, supra,* 645 F.2d at 135 (App. to Pet., p. 5a). That ruling is the subject of this writ of certiorari.

SUMMARY OF THE ARGUMENT

There are two types of Title VII cases, "disparate treatment" and "disparate impact" actions. The former involves intentionally different treatment of people in the employment setting on the basis of their race, color, religion, sex, or national origin. The latter centers on facially neutral employment practices which adversely affect the employment of one protected group's members more than those of another and cannot be justified by business necessity; discriminatory motive is not necessarily an essential element of this type of case. While in a disparate impact case the burden of showing that an employment practice has a manifest relationship to the employment in question falls on the employer, this burden does not become operative until the employee or prospective employee establishes a prima facie case of discrimination.

This case deals with alleged discrimination against the respondents' racial group because a disproportionate number of members of that group failed to pass a facially neutral employment test and were unable to continue on in the promotion process. The Court must determine in this case whether in the absence of discriminatory intent, a showing by a plaintiff of sta-

tistically adverse impact on his protected group at the component level without a showing that the protected group was statistically underrepresented in terms of the end product of the selection process, "the bottom line." is sufficient to establish a prima facie case of unlawful discrimination so as to cast on the employer the onerous burden of establishing the job relatedness of the component. Stated more basically, the Court must refine the basic concept of Title VII "discrimination," with respect to whether in such cases Congress intended it to apply to final personnel actions such as hiring, promotions, transfers and the like, or also to unintentional adverse impact at intermediate steps leading to these decisions.

Although the term "discrimination" is not statutorily defined, the Court has required an employer to justify a neutral, adversely impacting criterion only where there has been a disproportionate impact in the numbers of protected class members hired or promoted. This approach corresponds to the paramount objective of Congress in enacting Title VII, *i.e.*, improving the economic situation of blacks by integrating them into the mainstream of American society. The bottom line concept accurately mirrors this Congressional intent.

Additionally, the Court has required employers to justify neutral employment requirements or criteria in cases in which the requirements further operate to discriminate *invidiously*. These requirements have been deemed invidious in three senses: (1) when the employer knows or should know from demographic statistics that a requirement will adversely impact upon a protected group; (2) when a requirement is used to perpetuate past discrimination; and (3) when a requirement is used to exclude members of a culturally or educationally deprived group and their cultural or educational deprivation is directly traceable to their race. In none of these senses was the promotional examination in this case shown to be invidious.

The use of test statistics alone in a disparate impact case does not present an accurate picture of discrimination in light of Congressional intent. A plaintiff should not be deemed to have

established a prima facie case solely by showing a disparate impact upon his protected group of the test results when he fails to demonstrate by statistical evidence that the end results of the selection process have produced a disparate impact on his group and when there is no other evidence of unlawful discrimination. Determining impact on the bottom line will place no undue administrative burden on the courts.

Federal agencies involved in Title VII and similar civil rights enforcement responsibilities have treated adverse impact as a bottom line approach. This is evident from the Uniform Guidelines for Employee Selection Procedures adopted by several federal agencies, including the Equal Employment Opportunity Commission. Accordingly, the Uniform Guidelines have translated this concept into an administrative rule.

Without a rule gauging disparate impact at both the criterion and selection levels, both the courts and employers will be saddled with unreasonably heavy burdens. In view of the fact that Title VII protects persons of all races and national origins and both sexes, disparate impact could be found at several levels and on behalf of several groups. Without a realistic bottom line approach, public and private employers will be unable to conduct their affairs with confidence and courts will be regularly reduced to reviewing the job relatedness of employment examinations and even of individual examination sections or questions.

The examination in issue was protected by the Mansfield-Dirksen Amendment, which, *inter alia,* inserted the first portion of § 703(h) so as to exclude from the purview of an unlawful employment practice action taken pursuant to a bona fide merit system which did not result from an intention to discriminate. The legislative history surrounding the adoption of the Tower Amendment reveals that the merit system examinations were protected by the Mansfield-Dirksen Amendment. The record in this case clearly indicates that the subject examination was given as a part of Connecticut's merit system. The system, which has existed for over forty years, is unquestionably bona fide. There was no intention to discriminate impermissibly as evidenced by

the selection rate of promotees and the absence of any other evidence of discriminatory intent.

Additionally, the competitive nature of the merit system in Connecticut and other states is based by law upon the ranking of candidates. Courts and the Equal Employment Opportunity Commission have required additional validation of examinations used as ranking devices as opposed to mere pass/fail devices. This burden is onerous. States and local governments can amend state or local laws to change the nature of their merit systems in this respect only at the expense of other very important governmental objectives. Thus, Title VII will have proven to be harsher on public employers than on private employers.

ARGUMENT

I.

INTRODUCTION

Title VII cases fall into one of two categories: "disparate treatment" or "disparate impact" — or a combination of each. In "disparate treatment," "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of difference in treatment." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). Claims of "disparate impact" are those which "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity....Proof of discriminatory motive...is not required under a disparate impact theory." *Ibid.*

> Respondents, who seek to establish discrimination, have the traditional civil litigation burden of establishing that the acts they complain of constituted dis-

> crimination in violation of Title VII. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425.

General Electric Co. v. Gilbert, 429 U.S.125, 137 n. 14 (1976). First, however, such plaintiffs must sustain the burden of establishing a prima facie case of illegal discrimination. *International Brotherhood of Teamsters v. United States, supra*, 431 U.S. at 358; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

This action reaches this Court as a "disparate impact" suit.[6] This Court has held that in such a case claiming discrimination against a racial group resulting from a facially neutral employment test, a plaintiff makes out a prima facie case by showing "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); see also *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). A prima facie case in a Title VII action is a "legally mandatory, rebuttable presumption." *Texas Department of Community Affairs v. Burdine*, _____ U.S. _____, 101 S.Ct. 1089, 1094 n. 7, 67 L.Ed.2d 207, 216 (1981). Once this showing is made, the defendant employer must bear "the burden of showing that any given requirement [has]. . . a manifest relationship to the employment in question." *Dothard v. Rawlinson, supra*, 433 U.S. at 329; *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 425.

The issue presented by this case, however, is whether the employer must bear the burden of proving the job relatedness of his examination, when the members of plaintiffs' minority group are not underrespresented among those selected to fill the vacant positions for which success on the examination was one of several selection criteria. That is to say, should a court's

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[6]The amended complaint also alleged disparate treatment, but the Court of Appeals ruled that the District Court correctly treated this case as one of "disparate impact." *Teal v. Connecticut, supra*, 645 F.2d at 137 (App. to Pet., pp. 10a-11a).

vision be narrowed to an exclusive concern with the statistics as to the relative success rates on one segment of the selection process, the examination, or should a court look to the statistics regarding the results of the selection process as a whole, *i.e.*, the so-called "bottom line" statistics, before it imposes on an employer the burden of establishing the "manifest relationship" of an examination to the employment in question?

The answer to this procedural question will depend in large part on a basic substantive consideration; that is, what is the purview of employment discrimination subject to the strictures of Title VII? The respondents have based their cause of action on the claim that the "*examination discriminated* against blacks in that a disproportionate number of black candidates were excluded in the promotional process as a result of the examination, and in that the examination did not reflect adequately the candidates' ability to perform the jobs in question." Amended Complaint, ¶ 19 (J.A. 6) (emphasis added).

However, examinations do not unlawfully discriminate. Employers (or labor unions or employment agencies) may. 42 U.S.C. § 2000e-2(a), (b), (c). Examinations may be used as instruments of discrimination. But unlawful discrimination and the instruments by which it is accomplished are not the same thing. Accordingly, this Court must refine the concept of discrimination in an adverse impact case. Certainly Title VII would forbid any intentional racial discrimination against the respondents, whether in connection with the merit examination they took, or in connection with any other procedure which was part of the process for selection of the persons to be promoted to Welfare Eligibility Supervisor. Such intentional discrimination is absent in this case. In these circumstances, does a proper construction of Title VII require, under a disparate impact analysis, that the examination which the respondents took be proved to be job related when the evidence shows no disparate hiring or promotion impact on respondents' minority group?

II.

RESPONDENTS' PROOF OF THEIR FAILURE TO PASS A WRITTEN EXAMINATION AND OF THE DISPARATE IMPACT OF THE EXAMINATION ON THE PROTECTED CLASS OF WHICH THEY ARE MEMBERS DID NOT MAKE A PRIMA FACIE SHOWING OF A VIOLATION OF 42 U.S.C. § 2000e-2

A. Consistent With Congressional Intent, The Court Has Reviewed Employment Criteria Only Where Disparate Impact Has Been Present In The Total Selection Process.

Title VII of the Civil Rights Act of 1964 deals with discrimination by employers against employees or prospective employees on the basis of their race, color, religion, sex, or national origin. 42 U.S.C. § 2000e, *et seq.* Yet nowhere in Title VII are the terms "discrimination" or "discriminate" defined. *General Electric Co. v. Gilbert, supra,* 429 U.S. at 133. In disparate impact cases decided by this Court under § 703 of Title VII, 42 U.S.C. § 2000e-2, however, the Court has scrutinized a facially neutral and disparately impacting selection criterion only when there has been a disparate impact at the bottom line in the numbers of protected class members who were hired or promoted.[7]

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[7]Section 703(a) expressly states what is an unlawful employment practice for an employer, while § 703(h), by its very terms, states only what is not an unlawful employment practice. In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758 (1976), the Court did state:

> [A]s with the other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not.

Yet, in making that statement the Court was responding to an employer's claim that the seniority system provision of § 703(h) shielded it from liability under § 703(a) for refusing to hire members of a class of black petitioners on the basis of race. Sec. 703(h) came into issue

Griggs v. Duke Power Co., 401 U.S. 424 (1971), the first relevant decision on adverse impact, was clearly premised upon the inability of black employees to progress to higher paying, more desirable positions in the company. In that case there was a significantly small transfer rate among blacks out of the company's Labor Department, which contained unskilled, low-paying positions. *Id.* 401 U.S. at 429; see also *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1239 (4th Cir. 1970) (Sobeloff, J., concurring in part and dissenting in part, below). The employer had as alternative requirements for transfer out of the Labor Department the holding of a high school diploma and the passing of certain general intelligence and mechanical comprehension tests. Only after it had been determined that blacks as a group were being excluded by these prerequisites from the better jobs did the Court require the judicial scrutiny of them for job relatedness. *Id.* 401 U.S. at 430-431.

Likewise, in *Albemarle Paper Co. v. Moody, supra,* the employer required the passing of a non-verbal intelligence test and a general verbal facility test for entry into skilled lines of progression. Blacks passed the tests at only 64 percent of the rate at which whites passed. *Moody v. Albemarle Paper Co.*, 474 F.2d 134, 138 n. 1 (4th Cir. 1973). Few blacks succeeded in transferring to the skilled lines of progression. *Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 428-429. It was in these circumstances that this Court required judicial scrutiny of the tests for job relatedness.

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only after "the illegal discriminatory refusal to hire" had been established. *Ibid.* The Court's statement must be read in light of its context in *Franks,* namely, that § 703(h) defines legal or illegal employment practices thereunder only when the employer seeks a refuge under that provision because without its protection a plaintiff has otherwise established a case of discrimination against the employer under § 703(a). See *id.* 424 U.S. at 761; also *International Brotherhood of Teamsters v. United States, supra,* 431 U.S. at 346-347; *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 559-560 (1977).

In *Dothard v. Rawlinson, supra,* the touchstone of the Court's review of statutory minimum height and weight requirements for correctional counselors in a state's prison system was the disparity in the percentage of females actually employed in such positions in the system in relation to the percentage of males so employed. *Id.* 433 U.S. at 327-328. The Court then ruled that the employer had failed to establish the job relatedness of the requirements. In *Dothard,* the Court recognized the necessity of establishing bottom line discrimination, which concept emanated from *Griggs* and *Albemarle,* when it stated:

> We dealt in *Griggs v. Duke Power Co., supra* and *Albemarle Paper Co. v. Moody,* 422 U.S. 405, with similar allegations that facially neutral employment standards *disproportionately excluded Negroes from employment,* and those cases guide our approach here.

Id. 433 U.S. at 329 (emphasis added).

On the other hand, in *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86 (1973), the employer's policy of requiring American citizenship in order to be eligible for employment was not shown to exclude any national origin group from employment and there was no history of such discrimination. Consequently there was no violation of Title VII. *Id.* 414 U.S. at 95.

The Court's regard for the bottom line is thoroughly consistent with the purpose of Title VII. The primary concern of Congress in enacting Title VII was "the plight of the Negro in our economy." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). Blacks had traditionally been relegated to unskilled and semiskilled jobs. As a result of automation, the number of such jobs was rapidly decreasing and the impact of structural unemployment was falling disparately on blacks. "The crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them." *Ibid.* Otherwise, "Congress feared that the goals of the Civil Rights Act — the integration of blacks into the mainstream of American society

— could not be achieved...." *United Steelworkers of America v. Weber*, 443 U.S. 193, 202 (1979). Title VII was directed at an "historic evil of national proportions." *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 416.

> The primary purpose of Title VII was to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 800.

International Brotherhood of Teamsters v. United States, supra, 431 U.S. at 348. For this reason "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[8] *Griggs v. Duke Power Company, supra*, 401 U.S. at 432. In other words, "it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *International Brotherhood of Teamsters v. United States, supra*, 431 U.S. at 339-340 n. 20.

B. Consistent With Congressional Intent, The Court Has Reviewed Employment Criteria For Job Relatedness Only Where Use Of Such Criteria Has Resulted In Invidious Discrimination.

There was an additional facet of the *Griggs*, *Albemarle* and *Dothard* cases which, in conjunction with the disparate impact at the hiring or promotion level, led the Court to endorse judicial scrutiny of the arbitrariness, or the degree of job relatedness, of the facially neutral high school diploma and testing requirements

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[8]In *Griggs*, the "employment practices" included the diploma requirement and the tests, but their "consequences" were the inability of blacks either to gain skilled jobs with the employer or advance in the company. See *id.* 401 U.S. at 427-428.

in *Griggs*, the testing requirements in *Albemarle*, and the height and weight requirements in *Dothard*. That facet was the "invidiousness" of those requirements.

> In enacting Title VII, Congress required 'the removal of artifical, arbitrary and unnecessary barriers to employment when the barriers operate *invidiously* to discriminate on the basis of racial or other impermissible classification.' *Griggs v. Duke Power Co.*, 401 U.S. 424, 431.

Dothard v. Rawlinson, supra, 433 U.S. at 328 (emphasis added).

In *Griggs* the alternative requirements of a high school diploma or the passing of tests, was invidious in three ways. First, the high school diploma requirement had, from demographic statistics, a predictably adverse impact on blacks. The 1960 census statistics revealed that 34 percent of white males in North Carolina had completed high school but only 12 percent of blacks had. *Griggs v. Duke Power Co., supra*, 401 U.S. at 430 n. 6. Consequently the employer was creating a known "barrier" or "headwind" for a protected group. Secondly, the Duke Power Company had had a history of racial discrimination. Prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, Duke Power Company had restricted blacks to its Labor Department. *Ibid.* 401 U.S. at 427-428. When this segregation policy ended in 1965, the high school diploma and testing requirements, since they impacted more severely on blacks, tended to "'freeze' the status quo of prior discriminatory employment practices." *Id.* 401 U.S. at 430. Thirdly, the company was located in North Carolina, where blacks had long received inferior education in racially segregated schools. *Ibid.* As a consequence, blacks in North Carolina had been deprived of the means to articulate their basic intelligence. Therefore, the fact that blacks did more poorly than whites on the employer's intelligence tests "would appear to be *directly traceable to race*" in the sense that blacks, as a racial group, were culturally

deprived in North Carolina's segregated school system. *Ibid.* (emphasis added).

In *Albemarle,* the testing requirement was "invidious" in the second and third senses above. The Court viewed the question of job relatedness "in the context of the plant's operation and the history of the testing program." *Id.* 422 U.S. at 427. *Albemarle* had had a history of intentional job segregation by race. *Id.* 422 U.S. at 409. The use of the tests tended to "freeze" the segregated pattern in jobs which had sprung up in the period of intentional racial discrimination. Further, the Albemarle Paper Company was located in North Carolina as was Duke Power Company. There blacks, because of their race, had been restricted by law to racially segregated schools. Their poorer performance on intelligence tests was directly traceable to their blackness, which had landed them in culturally deprived, inferior schools.

In *Dothard v. Rawlinson, supra,* the facially neutral criterion, the height and weight requirement, operated invidiously in the first sense, the sense of predictably adverse impact based on demographic data. According to population statistics, the statutory height and weight requirements for prison guards would exclude more than 41 percent of the female population and less than one percent of the male population. *Id.* 433 U.S. at 329-330.

In the instant case, there is no invidious barrier in any of the above senses. First, there was no built-in headwind discernible from demographic statistics. The test was developed specifically for the selection procedure in issue. Secondly, the test did not operate to freeze the status quo of past discrimination. Thirdly, Connecticut, like many other states, has never had a dual system as to which it could be said that the education of blacks was, on account of their race, inferior and culturally deprived. Under such circumstances, to identify a protected class, whether it be a racial, an ethnic or a gender-based class, with cultural deprivation, would violate the Court's own tenet that "[p]ractices that classify employees in terms of religion, race or sex tend to

preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals."[9] *City of Los Angeles, Dept. of Water v. Manhart*, 435 U.S. 702, 709 (1978).

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[9]Senator Tower's Amendment which, after rewording, became the professionally developed ability test provision of § 703(h) was intended, *inter alia*, to protect employers against claims that discrimination against the culturally deprived was ordinarily to be equated with discrimination against a protected class. In the debate on the first version of his amendment (see *Griggs v. Duke Power Co., supra*, 401 U.S. at 436 n. 12), Senator Tower stated:

> Senators will recall that in the Motorola case the FEPC examiner found that the test used to select employees was discriminatory to culturally deprived or disadvantaged groups, in the words of the FEPC examiner.
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> * * *
>
> The FEPC examiner stated that the test could not be used; that the test was a denial of a fair employment opportunity, because it discriminated against what he vaguely called culturally deprived or disadvantaged groups.

110 Cong. Rec. 13492 (1964).

The Tower Amendment, as finally adopted as part of § 703(h), expressly protected professionally developed ability tests unless "designed, intended or used to discriminate because of race, color, religion, sex or national origin." In this case, which lacks the "cultural deprivation" circumstances present in *Griggs* and *Albemarle*, there is no basis, other than "traditional assumptions," for equating poorer performance by blacks on the test with use of the test as a device discriminating against them because of their race. There is nothing in the Tower Amendment which would require the petitioners in the case to establish the job relatedness of the examination.

The bills of the proponents of the 1964 Civil Rights Act did not mention employment examinations nor were there any legislative findings that such tests were intrinsically discriminatory so as to be subject to any direct proscription. The Tower Amendment was occasioned by

In such circumstances, to pursue the imagery of *Griggs*, when the respondents' protected group did not fail to get a fair share of the milk, there is no need for judicial scrutiny of each nook and cranny of the vessel. See *Griggs v. Duke Power Co., supra,* 401 U.S. at 431.

C. The Appropriate Evidentiary Rule Must Take Into Account All Relevant Statistics Regarding The Employer's Hiring Or Promotion Decisions.

In determining whether or not to measure adverse impact at the bottom line, the Court must exercise its powers "in light of the large objectives of the Act." *Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 416; see also *Hecht Co. v. Bowles,* 321 U.S. 321, 331 (1944).

In light of the purpose of Title VII, it is in the sense of "select[ions]...for hire" (*Dothard v. Rawlinson, supra,* 433 U.S. at 329; *Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 425), rather than in the sense of determining continuation in the hiring process, that statistics as to the success rate of protected groups are significant. Consequently, it is not so much the sta-

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several Senators concerned that, once enacted, Title VII could be used to prohibit virtually all employment examinations in the fashion of the decision by the state hearing examiner. See *Griggs v. Duke Power Co., supra,* 401 U.S. at 434 n. 10; see also Part III, *infra.* Senator Tower even stated that such a use of Title VII would force an employer to hire persons whom he did not believe to be competent and this "could result in the destruction of the free enterprise system as we know it." 110 Cong. Rec. 9026 (1964). "Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that 'Management prerogatives and union freedoms...be left undisturbed to the greatest extent possible.'" *United Steelworkers of America v. Weber, supra,* 443 U.S. at 206. The Tower Amendment was likewise an accommodation to safeguard generally the use of employment examinations by employers. See 110 Cong. Rec. 13492-13505, 13650-13651, 13724 (1964).

tistics regarding the impact of the particular criterion with which the Court should be concerned. Of real significance are the statistics regarding the rate of selection for hire or promotion of candidates from a protected class.

"Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality." *Griggs v. Duke Power Co., supra,* 401 U.S. at 433. In this case, test statistics are not the only useful servants, because they do not reflect reality in its entirety. The promotional statistics reveal that the promotion rate of black candidates was 169.5 percent of that of white candidates. Reality also includes the absence of any discriminatory motive on the petitioners' part and of any findings that the State of Connecticut, as an employer, has had any history of racial discrimination. In this context, the petitioners have satisfied Congress' concern with minority citizens penetrating the job market by eliminating intentional employment discrimination and the consequences of unwitting actions resulting in racial job segregation.

The petitioners submit that it is not enough for a plaintiff to introduce evidence as to any disparate impact of examination results on the protected group of which he is a member. In order to make a prima facie case of unintentional employment discrimination based on the statistically adverse impact of the employee selection process on the plaintiff's protected class, a plaintiff must also show the statistically significant adverse impact of the entire selection process on his protected class. Only then should a decision be made to pass over from the threshold inquiry of disparate impact to the issue of the job relatedness of an examination or any other component of the selection procedure.

> [T]he facts necessarily will vary in Title VII cases and the specification...of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations.

McDonnell Douglas Corporation v. Green, supra, 411 U.S. at 802 n. 13, quoted in *International Brotherhood of Teamsters v. United States, supra,* 431 U.S. at 358.

> [S]tatistics are not irrefutable, they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

International Brotherhood of Teamsters v. United States, supra, 431 U.S. at 340; see also *Hazelwood School District v. United States,* 433 U.S. 299, 319 (1977); *New York Transit Authority v. Beazer,* 440 U.S. 568, 584 n. 25 (1979).

Furthermore, the pattern projected by one set of statistics can be disparaged or altered by another set of statistics.

> If the defendants in a Title VII suit believe there to be any reason to discredit plaintiffs' statistics that does not appear on their face, the opportunity to challenge them is available to the defendants just as in any other lawsuit. They may endeavor to impeach the realiability of the statistical evidence, they may offer rebutting evidence, they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded.

Dothard v. Rawlinson, supra, 433 U.S. 321, 338-339 (Rehnquist, J., concurring), quoted in *Hazelwood School District v. United States, supra,* 433 U.S. at 319 n. 8 (Stevens, J., dissenting).

Moreover, determining impact at the bottom line need not create an administrative problem for the courts even when the employer is a governmental entity, as here. Among those states which have a statutory minimum duration for a state service em-

ployment list,[10] that minimum duration is usually short. For example, in Connecticut the minimum duration is only six months.[11] In cases involving a public merit system employer, the use of bottom line statistics should not unduly delay the trial of the case.

Therefore, requiring a plaintiff in a Title VII disparate impact testing case to establish a disparate impact at the hiring or promotional stage as well as at the testing stage will reflect the large objective of Title VII, opening the ranks of skilled occupations to members of minority groups.

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[10]Cal. [Gov't Code] § 18901(a) (West 1980) (1 year)
Colo. Rev. Stat. § 24-50-112 (1973) (1 year)
Hawaii Rev. Stat. § 76-23 (Supp. 1980) (1 year)
Ind. Code § 4-15-2-14 (1976) (6 months)
Iowa Code Ann. § 19A.9(5) (West 1978) (1 year)
Kan. Stat. Ann. § 75-2942(2) (1975) (1 year)
Ky. Rev. Stat. Ann. § 18.210(5) (Baldwin 1981) (2 years)
Mass. Gen. Laws Ann. ch. 31, § 25 (West Supp. 1981) (2 years)
Minn. Stat. Ann. § 43.17 (West Supp. 1981) (6 months or 1 year)
Mo. Ann. Stat. § 36.320(2) (Vernon 1969) (1 year)
Nev. Rev. Stat. § 284.250 (1979) (1 year)
N.J. Stat. Ann. § 11:9-10 (West 1976) (6 months)
N.Y. [Civ. Serv.] Law § 56 (McKinney Supp. 1980) (1 year)
Ohio Rev. Code Ann. § 124.26(A) (Page 1978) (1 year)
Tenn. Code Ann. § 8-30-308 (Supp. 1980) (6 months)
Wis. Stat. Ann. § 230.25(3) (West Supp. 1981) (6 months)

[11]Conn. Gen. Stat. § 5-217 provides:

> The commissioner of administrative services shall specify, at the time any employment list is promulgated, the period during which such list shall remain in force. In no case shall an employment list remain in force for a period of less than six months or more than one year, unless the period is extended by the commissioner for a period not to exceed an additional two years.

D. Federal Agencies Administer Title VII On The Basis Of Impact On The Bottom Line.

Federal agencies charged with civil rights enforcement responsibilities under Title VII and similar authorities have viewed unlawful discrimination based upon adverse impact in terms of ultimate personnel decisions. This Court has given such administrative interpretations "great deference" in determining Congressional intent. *Griggs v. Duke Power Co., supra,* 401 U.S. at 433-434. The Uniform Guidelines on Employee Selection Procedures (UGESP) were adopted jointly in 1978 by the Equal Employment Opportunity Commission (EEOC), the Department of Justice (Justice), the Labor Department (Labor), and the Civil Services Commission (CSC).[12] The guidelines purport to assist employers in complying with federal anti-discrimination law by providing "a framework for determining the proper use of tests and other selection procedures." 29 CFR § 1607.1B.[13] But "these guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results." *Ibid.* The guidelines expressly define "adverse impact" as "[a] substantially different *rate of selection in hiring, promotion or other employment decision* which works to the disadvantage of members of a race, sex or ethnic group." 29 CFR § 1607.16B (1979) (emphasis added). "Selection rate" is "[t]he proportion of applicants or candidates who are hired, promoted, or otherwise selected." 29 CFR § 1607.16R (1979).

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[12]The guidelines resulted from a Congressional mandate for uniformity among federal agencies in this area. 42 U.S.C. § 2000e-14. The first response was the Federal Executive Agency Guidelines published in 1976. 41 Fed. Reg. 51736 (1976) (Justice); 41 Fed. Reg. 51745 (1976) (Labor); 41 Fed. Reg. 51753 (1976) (CSC). The EEOC did not join in those guidelines. 41 Fed. Reg. 51734 (1976).

[13]CFR citations are to the UGESP as adopted by the EEOC. The UGESP in the same form were published by three other agencies in the titles of CFR assigned to them. See 5 CFR § 300.103(c), *et seq.* (1977) (CSC); 28 CFR § 50.14, *et seq.* (1979) (Justice); 41 CFR § 60-3, *et seq.* (1979) (Labor).

Substantively, the guidelines trigger requirements to report information and validate selection procedures on the basis of adverse impact in the "total selection process." See, *e.g.*, Questions and Answers, Nos. 13 and 14, "Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures."[14] 44 Fed. Reg. 11996, 11998 (1979).

Accordingly, federal agencies have translated their interpretation of adverse impact in terms of the bottom line into an administrative and prosecutorial guideline. The guideline explicitly does not require evaluation and validation of components, or enforcement action, "in usual circumstances," based upon adverse impact of a component when the total selection process reveals no adverse impact.[15] 29 CFR § 1607.4C (1979). At least one court has suggested the judiciary adopt this standard:

> [B]ut in allocating resources of governmental agencies, it also indicates a threshold of administrative concern about different hiring practices. At least in the absence of discriminatory intent, the threshold of judicial inquiry should be set at the same level.

Brown v. New Haven Civil Service Board, 474 F.Supp. 1256, 1263 n. 10 (D.Conn. 1979).

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[14]The substantive requirements of the FEA guidelines published by Justice, Labor and CSC prior to their use of the UGESP were likewise predicated upon adverse impact in the total selection process. See, *e.g.*, Questions and Answers, Nos. 3, 6 and 7, Questions and Answers to Federal Executive Agency Guidelines, 42 Fed. Reg. 4052, 4053 (1977).

[15]Obviously, the guideline cannot be hard and fast. As the Court of Appeals observed, many cases involve both disparate treatment and disparate impact. *Teal v. Connecticut, supra,* 645 F.2d at 137 (App. to Pet., p. 11a). Therefore, lack of disparate impact in a testing case may not foreclose a Title VII claim if other evidence of discrimination is present.

E. Exclusive Reliance On The Disparate Impact Of A Single Stage Of The Employee Selection Process Will Place Unreasonable Burdens On The Courts And On Employers.

The petitioners' position is also grounded on considerations of sound judicial administration. For the Court to require employers to bear the burden of showing manifest relationship to the employment in question of any requirement in the selection process which has an adverse impact on a protected group would be to place "a court on a course that has no boundaries and no clear end." *Brown v. New Haven Civil Service Board, supra,* 474 F.Supp. at 1262; see also *Friend v. Leidinger,* 588 F.2d 61, 66 (4th Cir. 1978). Such fragmentation of the selection process would increase the chances of finding adverse impact at some point in the process. In a situation with five identifiable protected classes (*e.g.*, blacks, Hispanics, whites, women and men)[16] and with five identifiable components or hurdles (*e.g.*, past experience, written test, medical examination, interview, background check), there would be twenty-five "cells" or checkpoints at which adverse impact would have to be evaluated. In such instance it is likely that by sheer chance,[17] one or more of the decision points would show an adverse impact on a protected group, thus very possibly exposing the employer —

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[16]The adverse impact rule is available to the "members of any race, sex or ethnic group," not just to racial minorities. UGESP, 29 CFR §§ 1607.3A, 1607.4D (1979); see also *Davis v. County of Los Angeles,* 566 F.2d 1334, 1341 n. 12 (9th Cir. 1978) *vacated as moot, sub. nom. County of Los Angeles v. Davis,* 440 U.S. 625 (1979). It would include whites because Title VII has been held to protect whites as well as racial minorities. *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 286-287 (1976).

[17]"Even a completely neutral practice will inevitably have some disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *City of Los Angeles, Dept. of Water v. Manhart, supra,* 435 U.S. 702, 710 n. 20; see also *Brown v. New Haven Civil Service Board, supra,* 474 F.Supp. at 1263.

and the courts — to the burden of a judicial proceeding in which the employer must establish the job relatedness of the requirement or requirements which gave rise to the adverse impact. In the meanwhile, hiring or promotions pursuant to the selection process may have been enjoined, with the consequent impairment of the employer's business, or if it is a public employer, the public's business. Or if hirings or promotions are allowed to proceed, it would be at the employer's risk of back pay or front pay or of other liability to a plaintiff or group of plaintiffs.

In principle, there is little or no difference between judicial scrutiny of the job relatedness of a particular hurdle in a multifaceted selection process, just because that hurdle happens to have a disparate impact, and judicial scrutiny of one section of an employment test, when that section has an adverse impact on a protected group and a member of that group failed that section, with the result that he failed the exam and was disqualified for selection.

> Carried to its logical extreme, such a criterion would require the elimination of individual questions marked by poorer performance by a racial group, on the ground that such a question was a 'subtest' of the 'subtest.'

Smith v. Troyan, 520 F.2d 492, 498 (6th Cir. 1975), *cert. den.* 426 U.S. 934 (1976).

III.

SINCE THE EXAMINATION WAS USED WITHOUT INTENT TO DISCRIMINATE BECAUSE OF RACE AND PURSUANT TO A BONA FIDE MERIT SYSTEM, THE PROOF OF ADVERSE IMPACT DID NOT MAKE OUT A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION

A. The Mansfield-Dirksen Amendment Applies To Employment Examinations Administered Pursuant To A Bona Fide Merit System.

The Senate proceedings surrounding the adoption of the Tower Amendment reveal that employment examinations are covered not only by the second portion of § 703(h), discussed above, but also that some employment examinations are encompassed by the first portion of that statute insofar as these particular examinations are administered pursuant to a bona fide merit system.

In introducing his proposed amendment, Senator Tower stated that his amendment, which arose "from my concern about what happened in the Motorola FEPC case," was an effort to protect employers who used examinations as a "means of determining the trainability and competence of a prospective employee, or the competence of one who is currently employed and being considered for promotion." 110 Cong. Rec. 13492 (1964). The proponents resisted this amendment. Senator Humphrey took the lead and stressed that Senator Tower's concern for such tests had been addressed by the leadership when it formulated and introduced on the previous day (June 10, 1964), the comprehensive Mansfield-Dirksen Amendment[18] (Amend-

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[18]The amendment provided in relevant part:

> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or

ment No. 1052, 110 Cong. Rec. 13310-13319), which, under Title VII, included a specific section to deal with the *Motorola* situation. He stated:

> Mr. President, I yield myself 30 seconds to say that the substance of this amendment was given the most careful consideration at the time the leadership group met to perfect the so-called package substitute. Needless to say, the amendment was of grave concern to us because it refers to a case in the State of Illinois, and that matter was well represented by none other than the distinguished minority leader.
>
> Every concern of which this amendment seeks to take cognizance has already been taken care of in title VII, as amended, and presented in the substitute. *These tests are legal. They do not need to be legalized a second time. They are legal unless used for the purpose of discrimination.* The amendment is unnecessary. It would only complicate the package amendment, which has been carefully drawn and represents the considered views on the part of those concerned about title VII.

110 Cong. Rec. 13504 (emphasis added).

Later, in response to a question from Senator Lausche about the circumstances under which employee tests would be valid, Senator Humphrey reiterated:

> different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

110 Cong. Rec. 13315. This language ultimately became the first clause of § 703(h), 42 U.S.C. § 2000e-2(h).

> Such tests are considered to be legal; there has never been a denial of that. The only point is that the test that is used for purposes of discrimination would be declared illegal.

Ibid. Senator Case, a Senate Floor Captain for Title VII,[19] likewise argued on two occasions that Senator Tower's proposed amendment was unnecessary and also stated that the amendment would tend to complicate a case of "actual discrimination." 110 Cong. Rec. 13503, 13504.

Shortly thereafter Senator Miller spoke of the Mansfield-Dirksen Amendment as follows:

> I believe that during the development of the amendment the question of its not being an unfair labor practice for an employer to provide for the furnishing of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings was discussed.

110 Cong. Rec. 13504.

Senator Miller then went on to ask the following question regarding the Tower Amendment:

> Would not a test of such as is covered by the amendment have to be included in the concept of such a system as I have mentioned?

Ibid.

Senator Humphrey answered in the affirmative. 110 Cong. Rec. 13504.

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[19]See *International Brotherhood of Teamsters v. United States, supra,* 431 U.S. at 351 n. 35.

Senator Miller expressly acknowledged the correctness of Senator Humphrey's position on the next day and went on to state:

> I point out that the phrase 'privileges of employment pursuant to a bona fide seniority or merit system' is intended to include such examinations.
>
> I hope that statement will satisfy the Senator from Ohio, because that is the intention of Congress. If the Senator has some misgivings about it, I hope he will take this assurance, because it was clearly spelled out yesterday.

110 Cong. Rec. 13651.

Therefore, it must be concluded that the Mansfield-Dirksen Amendment which contained the first portion of § 703(h) encompassed an employment examination administered as part of a bona fide merit system. The 1972 amendments to Title VII, which brought the petitioner, State of Connecticut, within the purview of the Act, also brought the petitioner's merit system within the protection of the Mansfield-Dirksen Amendment.

B. The Examination Was Unquestionably Administered Pursuant To A Bona Fide Merit System Without Intention To Discriminate.

There is no doubt that the promotional examination was developed and administered and its results used within the framework of Connecticut's merit system. The respondents brought the State's merit system into issue in their pendent jurisdiction cause of action when they claimed that the examination violated Conn. Gen. Stat. § 5-219. Amended Complaint, ¶ 36 (J.A. 9). Sec. 5-219, entitled "Character of Examinations," requires that examinations "fairly test and determine the qualifications, fitness and ability of the persons tested to perform the duties of the class or position to which they seek appointment."

Sec. 5-219 is an essential part of Chapter 67 of the Connecticut General Statutes, known as the "State Personnel Act." Conn. Gen. Stat. § 5-193. The guiding principle of the Act is that "[t]he system of personnel administration for employees in the state service shall be based on merit principles." Conn. Gen. Stat. § 5-195. The chapter "established a civil service system based upon principles of merit...." *Engle v. Personnel Appeal Board,* 175 Conn. 127, 131, 394 A.2d 731, 734 (1978). The system embodied in the chapter "was designed to eliminate, as far as practicable, the 'spoils' system of making appointments based upon political affiliations, and to prevent discrimination in appointments and dismissals based upon considerations other than fitness to perform a job." *Wagner v. Connecticut Personnel Appeal Board,* 170 Conn. 668, 671, 368 A.2d 20, 22 (1976); see also *State ex rel. McNamara v. Civil Service Commission,* 128 Conn. 585, 588, 24 A.2d 846, 847 (1942). These obectives are achieved substantially through competitive examinations which produce lists of candidates eligible for selection. *Resnick v. Civil Service Commission,* 156 Conn. 28, 31, 238 A.2d 391, 392 (1968).

The bona fide nature of the State of Connecticut's merit system is established in law and cannot be disputed. The system has existed in basically its present state continuously since 1937. Conn. Gen. Stat. § 422d, *et seq.* (1937 Supp.). Its entire appointment and promotions process is tightly controlled by law. Conn. Gen. Stat. §§ 5-216 - 5-230, inclusive. Applicants for employment or promotion are given, *inter alia,* the rights to appeal rejections of their applications to take an examination, to inspect their examinations and to be free of discrimination in appointments or promotions because of expression of political opinions or because of political affiliations. Conn. Gen. Stat. §§ 5-221a, 5-225, 5-227. Despite the advent of collective bargaining for state employees in 1975, the appointment process of the merit system itself has remained by law inviolate and under the

control of the state legislature. Conn. Gen. Stat. § 5-272(d).[20] Finally, as pointed out above, the examinations themselves must be prepared so as to test fairly the qualifications, fitness and ability of the candidates to perform the job in question. The system is obviously bona fide.

The merit system examination results were used in conjunction with other factors by the "appointing authority," petitioner Maher, Commissioner of Income Maintenance, when he made his selections of persons to be promoted. *Teal v. Connecticut, supra,* 645 F.2d at 135 (App. to Pet., p. 7a). The actual selections involved the exercise of discretion by the appointing authority performing his duties under the State's merit system. Conn. Gen. Stat. §§ 5-228, 5-229. The appointing authority chose those persons who would, in the words of § 703(h), enjoy "the terms, conditions or privileges of employment" incident to positions in the class of Welfare Eligibility Supervisor. The choice of such persons pursuant to the State's merit system was not unlawful discrimination in this case, unless, according to § 703(h), there was an intention to discriminate on the basis of race.

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[20]Sec. 5-272(d) provides:

> Nothing herein shall diminish the authority and power of the personnel appeal board, the department of administrative services or any state agency established by statute, charter or special act to establish, conduct and grade merit examinations and to rate candidates in order of their relative excellence from which appointments or promotions may be made to positions in the competitive division of the classified service of the state served by the department of administrative services. The establishment, conduct and grading of merit examinations, the rating of candidates and the establishment of lists from such examinations and the appointments from such lists shall not be subject to collective bargaining.

Here the District Court found no intention to discriminate on the part of any petitioners in this case. Memorandum of Decision of District Court (App. to Pet., p. 24a). To the contrary, the rate of selection of black candidates for the subject position totally belies any such claim.

Therefore, the merit system examination and selection procedure were protected by § 703(h). See *Kirkland v. New York State Department of Correctional Services,* 520 F.2d 420, 428 (2d Cir. 1975). "[T]he unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." *International Brotherhood of Teamsters v. United States, supra,* 431 U.S. at 352. The same is, by the express language of § 703(h), no less true for the routine application of a bona fide merit system.

C. The Competitive Nature Of The Merit System Supports Inclusion Of The Examination Under The Mansfield-Dirksen Amendment.

There is an additional reason why an employment examination administered pursuant to a bona fide merit system without intent to discriminate should be deemed to be permitted by § 703(h). Section 5-196(k) of the Connecticut General Statutes defines "examination" as "an assessment device or technique yielding scores designed to determine the fitness of, and rank candidates in order of fitness for, a given class or classes." Examinations are to be "competitive." Conn. Gen. Stat. § 5-219. An appointment to a vacant position in the classified service whether from an agency promotional list or a service-wide promotional list, or from an open-competitive list, is to be from among persons having one of the top five ratings, with an additional rating made available for each additional vacancy. Conn. Gen. Stat. § 5-228(b), (c), (d). This kind of scheme, with the number of ranks from which the appointing authority can select being limited by the number of vacancies, is not unusual. See *Lee v. City of Richmond,* 456 F.Supp. 756, 764 (E.D.Va. 1978); also *Kirkland v. New York State Department of Correctional Services, supra,* 520 F.2d at 424. Rankings and the duty to

choose from among the highest ranks (usually the highest three or the highest five) are important parts of most states' merit systems.[21] When such rankings are used there can be an additional, heavier burden of showing job relatedness imposed on the employer. In the Second Circuit, validity for the purposes of establishing minimum qualifications is a lower order of validity than that necessary to justify the ranking of successful candidates on the examination. Exam results used to rank candidates require "such substantial test validity that it is reasonable to expect one — or two — point differences in scores

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[21] Ala. Code § 36-26-17 (Supp. 1981)
Cal. [Gov't] Code § 19057 (West 1980)
Colo. Rev. Stat. § 24-50-115 (1973)
Del. Code. Ann. tit. 29, § 5921 (1979)
Hawaii Rev. Stat. § 76-23 (Supp. 1980)
Idaho Code § 67-5309(e) (Supp. 1981)
Ill. Ann. Stat. ch. 127, § 63b 108b.5 (Smith-Hurd 1981)
Ind. Code § 4-15-2-19 (1976)
Iowa Code Ann. § 19A.9(7) (West 1978)
Kan. Stat. Ann. § 75-2943(1) (1975)
Ky. Rev. Stat. Ann. § 18.210(7) (Baldwin 1981)
Md. Gen. Laws Ann. art. 64A, § 17 (1979)
Mich. Stat. Ann. § 5.1191(13) (rev. ed. 1973)
Minn. Stat. Ann. § 43.18 (West Supp. 1981)
Minn. Stat. Ann. § 43.19 (West Supp. 1981)
Mo. Ann. Stat. § 36.240(3) (Vernon Supp. 1981)
Nev. Rev. Stat. § 284.265 (1979)
N.J. Stat. Ann. § 11:10-1 (West 1976)
N.Y. [Civ. Serv.] Law § 61 (McKinney 1973)
Ohio Rev. Code Ann. § 124.31 (Page Supp. 1980)
Okla. Stat. Ann. tit. 74, § 832 (West 1976)
Pa. Stat. Ann. tit. 71, § 741.601 (Purdon Supp. 1981)
R.I. Gen. Laws § 36-4-26 (1978)
Tenn. Code Ann. § 8-30-309 (Supp. 1980)
W. Va. Code § 29-6-8(5) (1980)
Wis. Stat. Ann. § 230.25(1) (West Supp. 1981)

The petitioners submit that such systems are prevalent in many, if not most, local governments.

to reflect differences in job performance." *Guardians Ass'n. of New York City v. Civil Service Commission,* 630 F.2d 79, 100-101 (2d Cir. 1980). A similar rule prevails in the Fifth and Eleventh Circuits. *Ensley Branch of N.A.A.C.P. v. Seibels,* 616 F.2d 812, 817 (5th Cir. 1980). The EEOC requires for a showing of validity of ranked scores that when criterion or construct validity are used, there be mathematical support for the proposition that persons who receive higher scores in the procedure are likely to perform better on the job. 29 CFR § 1607.5G (1979);[22] see also "Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures." 44 Fed. Reg. 11996, 12005, Q. & A. 62 (1979).

Where a paper and pencil test is used, supported by content validity alone, and reading is an essential but not a major part of a job, use of a reading test for ranking purposes would not be sufficiently validated. *Id.* Q. & A. No. 62.

The competitive, ranking, nature of Connecticut's merit system should not, without express legislative authorization, be frustrated or broken down by judicial fragmentation of it into its parts, for the purpose of determining the disparate impact of those parts on a protected class, or the job relatedness of those parts or the rankings based on those parts.

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[22]29 CFR § 1607.5G provides in pertinent part:

> Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis..., the user should have sufficient evidence of validity and utility to support the ranking basis.

Connecticut, like other states with statutory civil service ranking system requirements, cannot be exonerated from such requirements by executive fiat. Nor can such requirements be eliminated by legislative action except at the expense of the important public interest in obtaining qualified workers and in maintaining public confidence in government. The competitive nature of civil service examinations, resulting in rankings, is one of the principal methods of achieving the objectives of the merit system in Connecticut. *State ex rel. Chernesky v. Civil Service Commission,* 141 Conn. 465, 469, 106 A.2d 713, 715 (1954). So, unlike a private employer who has flexibility in employment procedures, petitioners must work within the present system. The State of Connecticut, as an employer, had 45,082 full-time employees as of December 31, 1980; Connecticut Register and Manual, p. 854 (1981); most of these employees were in the classified service.[23] During the fiscal year ending on June 30, 1980, the petitioner Department of Administrative Services processed 40,000 applications for employment or promotion and actually administered 926 competitive examinations. Digest of Connecticut Administrative Reports, Vol. 34, p. 53 (1980). Yet, notwithstanding this staggering workload, the state may be in a position of concerning itself not just with proving the validity of examinations as pass/fail devices, but as ranking devices as well. If public employers are required to prove validity of all of their tests in this twofold manner, even when there is no discriminatory impact in hiring or promotions, they will have been subjected to even greater, more costly, burdens than private employers.

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[23]In Connecticut, an employee is deemed to be in the classified service unless specifically exempted by statute. Conn. Gen. Stat. §§ 5-196(e), 5-197, 5-198.

CONCLUSION

It would be contrary to the intent of Congress in Title VII, to past precedent, and to public policy and sound judicial administration, for the Court, upon a mere showing of the disparate impact of a component of the selection process, to cast upon the petitioners the burden of proving the job relatedness of that component. For the foregoing reasons, the petitioners pray that the judgment of the Court of Appeals for the Second Circuit be reversed.

Respectfully submitted,

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December 3, 1981

NO. 80-2147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CONNECTICUT, *et al.*
Petitioners,

V.

WINNIE TEAL, *et al.*
Respondents.

APPENDIX TO BRIEF OF PETITIONERS

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RELEVANT SECTION OF 1937 SUPPLEMENT TO CONNECTICUT GENERAL STATUTES

Sec. 422d. Merit System. There is established a merit system for employees of the state. All appointments to, and promotions in, positions in the state service, except as hereinafter specified, shall be made only according to merit and fitness, to be ascertained by examinations, which examinations shall be competitive and given in accordance with the provisions of this chapter. The merit system shall be administered by the personnel department, established under the provisions of Section 425d.

RELEVANT SECTIONS OF THE CONNECTICUT GENERAL STATUTES (Rev. 1981)

Sec. 5-193. Short title. This chapter [Chapter 67] shall be known and may be cited as the State Personnel Act.

Sec. 5-194. Construction and administration. This chapter shall be so construed and administered as to provide a uniform and equitable system of personnel administration of employees in the state service. Recruitment, selection, appointment, development, promotion, transfer, layoff, classification, compensation, discipline, separation and provision for the welfare of state employees shall be performed in a manner to secure and retain well qualified employees to carry out state programs effectively and efficiently and to provide reasonable stability of employment in the state service.

Sec. 5-195. Merit principles to be observed. The system of personnel administration for employees in the state service shall be based on merit principles. All appointments and promotions, except as hereinafter specified, shall be made according to merit and fitness as ascertained by examinations given in accordance with provisions of this chapter.

Sec. 5-196. Definitions. The following terms, when used in this chapter, shall have the following meanings unless the context otherwise requires:

* * *

(e) "Classified service" means every office or position in the state service, whether full-time or part-time, for which compensation is paid, except those offices and positions specified in section 5-198 or otherwise expressly provided by statute.

* * *

(k) "Examination" means an assessment device or technique yielding scores designed to determine the fitness of, and rank candidates in order of fitness for, a given class or classes.

* * *

Sec. 5-197. Offices in state service to be classified; exceptions. Any office or position in the state service, whether full-time or part-time, shall be a position in the classified service, except as hereinafter set forth in this chapter or otherwise specified by statute.

Sec. 5-198. Positions exempt from classified service. The offices and positions filled by the following-described incumbents shall be exempt from the classified service:

(a) All officers and employees of the judicial department;

(b) All officers and employees of the legislative department;

(c) All officers elected by popular vote;

(d) All agency heads, members of boards and commissions and other officers appointed by the governor;

(e) All persons designated by name in any special act to hold any state office;

(f) All officers, noncommissioned officers and enlisted men in the military or naval service of the state and under military or naval discipline and control;

(g) All superintendents or wardens of state institutions, the state librarian, the president of The University of Connecticut and any other commissioner or administrative head of a state department or institution who is appointed by a board or commission responsible by statute for the administration of such department or institution;

(h) The state historian appointed by the state library board;

(i) Deputies to the administrative head of each department or institution designated by statute to act for and perform all of the duties of such administrative head during his absence or incapacity;

(j) No more than three executive assistants to each state elective officer and each department head, as defined in section 4-5, except that an agency which has within it separate divisions under any provision of the general statutes, for other than administrative purposes, may have one additional executive assistant for each division but no more than five such assistants per agency, provided each position of executive assistant shall have been created in accordance with section 5-214. Executive assistant positions in excess of the number so permitted may be retained through December 31, 1979, unless vacated prior to that date;

(k) One personal secretary to the administrative head and to each under-secretary or deputy to such head of each department or institution provided any classified employee whose position is affected by this subsection shall retain classified status in such position;

(l) All members of the professional and technical staffs of the constituent units of the state system of higher education as defined in section 10-322a, of all other state institutions of learning, of the board of higher education, and of the agricultural experiment station at New Haven, professional employees of the state board of education and teachers certified by the state board of education and employed in teaching positions at state institutions;

(m) Physicians, dentists, student nurses in institutions and other professional specialists who are employed on a part-time basis;

(n) Persons employed to make or conduct a special inquiry, investigation, examination or installation;

(o) Students in educational institutions who are employed on a part-time basis;

(p) Forest fire wardens provided for by section 23-36;

(q) Patients or inmates of state institutions who receive compensation for services rendered therein;

(r) Employees of the governor including employees working at the executive office, official executive residence at 990 Prospect Avenue, Hartford and the Washington D.C. office;

(s) Persons filling positions expressly exempted by statute from the classified service;

(t) Librarians employed by the state board of education or any constituent unit of the state system of higher education;

(u) Employees in the senior civil service.

* * *

Sec. 5-216. Establishment of employment lists. Continuous recruitment. Waiver of appointment. (a) From time to time, as deemed necessary to supply the needs of the state service, the commissioner of administrative services shall hold examinations for the purpose of establishing employment lists for the various classes of positions in the classified service. In establishing any employment list following examinations, the commissioner of administrative services shall place on the list, in the order of their ratings, the names of persons who show they possess the qualifications which entitle them to be considered eligible for appointment when a vacancy occurs in any position allocated to the class for which such test is held or for which such employment list is held to be appropriate. Such ratings may take such form as said commissioner deems appropriate to describe the performance of any candidate on any examination.

(b) Where the needs of the service indicate that continuous recruitment is justified, the commissioner of administrative services may defer announcing a closing date for filing applications for the necessary test until such time as the employment lists promulgated as a result of such recruitment are adequate. Announcements of such examinations shall specify that recruitment is continuous and that applications may be filed until further notice. All candidates who pass such continuous recruitment examinations shall be graded on a pass-fail basis, and all candidates who pass shall be immediately eligible for certification and appointment.

(c) The commissioner of administrative services may consolidate, continue or cancel employment lists and may remove names from such lists for good cause.

(d) Any person who has twice waived appointment shall be placed at the foot of the employment list. Any person who has twice failed to reply to notification of availability of a position shall not be certified again unless such person so requests.

Sec. 5-217. Effective period of lists. The commissioner of administrative services shall specify, at the time any employ-

ment list is promulgated, the period during which such list shall remain in force. In no case shall an employment list remain in force for a period of less than six months or more than one year, unless the period is extended by the commissioner for a period not to exceed an additional two years.

Sec. 5-218. Examinations; notices. (a) The commissioner of administrative services shall prepare lists of preliminary requirements and subjects of examination for the several positions in the classified service and advertise each such examination in such manner as the nature of the examination requires. All competitive examinations shall be held at such times and places as, in the judgment of the commissioner of administrative services most nearly meet the convenience of applicants and needs of the service.

(b) The commissioner of administrative services shall give public notice of such examinations for positions in the classified service at least two weeks in advance by posting, or causing to be posted, an appropriate notice on the bulletin board maintained in or near the quarters of the department of administrative services, by advertising such examination once in at least one newspaper published in each congressional district in the state and by submitting the notice to the director of the state employment service. Such notice shall set forth the time, place and general scope of the examination and shall contain appropriate information concerning the duties, work location, conditions, salary and requirements of the positions, and the examination procedures, including the weights to be given for the weighted parts of the examination if applicable.

Section 5-219. Character of examinations. Qualifications for admission. Examinations shall be in such form and of such character and shall relate to such matters as will fairly test and determine the qualifications, fitness and ability of the persons tested to perform the duties of the class or position to which they seek appointment. Examinations shall be formulated in cooperation with agencies appointing specific classes of employees and shall be competitive, free and, except as other-

wise expressly provided by statute, open to all persons who may be lawfully appointed to any position in the class for which examinations are held, with such limitations as to age, residence, health, habits, character, sex and qualifications as are considered desirable by the commissioner of administrative services and as are specified in the public announcement of the test, provided no such limitation shall be made as to age or sex except in the case of a bona fide occupational qualification or need. In determining the qualifications of persons who will be admitted to an examination, consideration shall be given to any previous volunteer experience which such persons may have. No requirement as to formal education except for entrance training positions shall be established for the taking of such examinations. Examinations may take the form of written or oral tests, demonstration of skill or physical ability, experience and training evaluation, or in the case of promotional examinations, evaluation of prior performance, or any other examination devices deemed appropriate to measure the knowledge, skill or ability required to perform the duties of the job. All persons competing for placement on any one employment list shall be administered the same examination or examination phases and be required to achieve passing scores on each successive phase and for the examination as a whole in order to remain in competition. The provisions of this section shall be the sole determinant for qualification and no other examination or device shall be permitted by any agency head to further qualify persons seeking appointment except as authorized by said commissioner.

Sec. 5-219a. Volunteer experience considered. Analysis of personnel hirings. (a) It shall be the policy of all state agencies to consider volunteer experience as partial fulfillment of training and experience requirements for state employment. The commissioner of administrative services shall adopt regulations in accordance with the provisions of chapter 54 to implement such policy.

(b) Each state agency shall include an analysis of personnel hirings for the preceding year in its annual report to the governor. Such report shall indicate the extent to which volunteer

experience was taken into account in determining the qualifications of applicants for state employment.

Sec. 5-220. Conduct of examinations. (a) Examinations shall be conducted by the commissioner of administrative services or under his direction by an authorized agent. In giving examinations for positions in the classified service, the commissioner may obtain the assistance of persons not on the regular staff of the department of administrative services, either within or without the classified service. When such persons are in the state service, it shall be deemed a part of their official duty to act as examiners without extra compensation.

(b) The commissioner of administrative services may fully or partially delegate to the heads of state agencies the authority to administer specified promotional examinations subject to post audit by the department of administrative services. The delegation plan shall be approved by said commissioner, shall provide for consideration of all eligible persons and shall include adequate notice of the vacancy or vacancies to all potentially eligible employees, the procedures for application and methods to be used to determine the rating of eligible persons.

Sec. 5-221. Rejection of applicants. (a) The commissioner of administrative services may reject the application of any person for admission to a test for establishing an employment list for the classified service, or refuse to test any applicant, or refuse to certify the name of an eligible, for such service, who has been found to lack any of the established qualifications for the position for which he applies or for which he has been tested or who is physically or medically unfit to perform effectively the duties of the position in which he seeks employment or who is addicted to the habitual use of drugs or intoxicating liquors or who has been dismissed from the public service for delinquency, incompetency, misconduct or neglect of duty, or who has made a false statement of any material fact or practiced or attempted to practice any deception or fraud in his application, in his tests or in securing his eligibility or appointment.

(b) The commissioner of administrative services may establish reasonable procedures concerning investigation of the character, reputation, experience and training of applicants.

Sec. 5-221a. Appeal from rejection of application for admission to examination. Within seven days of the receipt by an applicant for employment or an employee in the state classified service of a notice of rejection of his application for admission to an examination held for the purpose of establishing an employment list for any position in the classified service, such applicant or employee may appeal such rejection to the commissioner of administrative services. The commissioner shall forthwith appoint a panel consisting of one personnel officer from each of three state agencies, each of which has more than one hundred employees, which panel shall hear and decide upon such employee's appeal within sixty days from the date such appeal was received by the commissioner.

Sec. 5-222. Unassembled examinations for certain professional positions. Regulations. Section 5-222 is repealed.

Sec. 5-223. Rating of examinations. The final earned rating of each person who competes in and passes each phase of any test shall be determined by the weighted average of the earned ratings on all phases of the test, according to weights for each phase established by the commissioner of administrative services in advance of the giving of the tests and published as a part of the announcement of the examination.

Sec. 5-224. Credit for military service on examinations. Any veteran who served in time of war, if such veteran is not eligible for disability compensation or pension from the United States through the veterans' administration, or the spouse of such veteran who by reason of such veteran's disability is unable to pursue gainful employment, or the unmarried surviving spouse of such veteran, and if such person has attained at least the minimum earned rating on any examination held for the purpose of establishing an employment list, as provided in section 5-216, shall have five points added to his or her earned rating. Any

such veteran, or the spouse of such veteran who by reason of such veteran's disability is unable to pursue gainful employmen or the unmarried surviving spouse of such veteran, if such person is eligible for such disability compensation or pension and if he or she has attained at least the minimum earned rating on any such examination, shall have ten points added to his or her earned rating. Names of such veterans and the names of such spouses or surviving spouses shall be placed upon the lists of eligibles in the order of such augmented ratings. Credits shall be based upon examinations with a possible rating of one hundred points.

Sec. 5-225. Notice of ratings on examinations. Candidate's right of inspection. All persons competing in any test shall be given written notice of their final earned ratings and except in the case of an examination administered in accordance with the provisions of subsection (b) of section 5-216, shall be given written notice of their relative standing upon the eligible lists or of their failure to attain a place upon such lists. The papers, markings and other items used in determining the final earned ratings, other than the questions and other materials constituting the test itself, shall be open to inspection by the candidate, subject to such regulations as may be issued by the commissioner of administrative services.

Sec. 5-226. Corrupt practices in relation to examinations and appointments. No person, by himself or in cooperation with one or more persons, shall wilfully defeat, deceive or obstruct any person in respect to his right of taking any examination or examinations or of receiving appointment to any position in the state classified service according to this chapter or according to any regulations made hereunder; shall wilfully or corruptly or falsely mark, rate, grade, estimate or report upon the examination or examinations or standing of any person tested whose name has been placed upon any employment or reemployment list or certified pursuant to the provisions of this chapter, or aid in so doing; shall wilfully make any false representation concerning any application or examination or concerning the person examined; shall wilfully or corruptly furnish to any person

any special or secret information for the purpose of either improving or injuring the prospects or chances of any person so examined or certified, or being tested or certified, or shall impersonate any other person or permit or aid in any manner any other person to impersonate him in any examination or appointment or request to be tested, certified or appointed, or shall use, represent to use, promise or endeavor to use influence or official or political authority to secure for any person any appointment or prospect of appointment to any position in the classified service.

Sec. 5-227. Discrimination prohibited. No person in the classified service or seeking admission thereto may be appointed, demoted or dismissed or be in any way favored or discriminated against because of his political opinions or affiliations or as the result of a discriminatory employment practice as defined in section 46a-51. No question in any examination or contained on any form used in connection with carrying out the provisions of this chapter may relate to political or religious opinions or affiliations of any competitor, prospective competitor or eligible person on any employment or reemployment list established and maintained by the commissioner of administrative services.

Sec. 5-228. Promotional appointments. Original appointments. Sex discrimination. (a) When a vacancy in any permanent position in the classified service is to be filled, the appointing authority shall notify the commissioner of administrative services of such fact, stating the title of the position to be filled. Vacancies in such positions shall be filled, so far as practicable and for the best interest of the state, by promotional appointments from within the agency and servicewide promotional appointments in accordance with regulations issued by the commissioner of administrative services. The appointing authority, with the approval of the commissioner of administrative services shall decide whether a vacancy shall be filled by promotion from within the agency, from a statewide employment list, or if such is not practicable, by original appointment or transfer.

(b) If a vacancy is to be filled by a promotional appointment from within the agency, the commissioner of administrative services shall first certify to the appointing authority the names of all persons from the agency having the five highest final earned ratings in competitive examinations open to those who have served a minimum time established by regulation in such lower class or classes of positions as are designated with one additional earned rating for each additional vacancy. If necessary to complete the certification, the commissioner of administrative services shall then certify in order of final earned ratings the names of those persons highest on a servicewide employment list.

(c) If a vacancy is to be filled by promotion from a servicewide employment list, the commissioner of administrative services shall certify to the appointing authority the names of all persons having the five highest final earned ratings on that employment list.

(d) If a vacancy is to be filled by an original appointment, the commissioner of administrative services shall certify to the appointing authority the names of the five persons highest on the reemployment list for the class to which the vacant position has been allocated, or, if no reemployment list for the class exists, all persons having the five highest earned ratings on the employment list for the class or on the employment list held appropriate. The appointing authority shall be entitled in a certification to not less than five earned ratings for one vacancy and one additional earned rating for each additional vacancy. After a candidate has been certified three times to the same appointing authority and has not been accepted by such authority, his name shall not again be certified to such authority, except at the request of such authority.

(e) Appointees shall be required to serve the working test period provided for in this chapter. Any promotional appointee from within the agency who is dismissed from the position to which he was promoted during such working test period, or at the conclusion thereof, shall be restored to a position in the

same class in which he had been employed prior to his promotion. Any other appointee who was employed in the classified service prior to his appointment and who is dismissed from the position to which he was appointed during such working test period or at the conclusion thereof, shall be restored to a vacancy in the same class, or a vacancy in a comparable class or a vacancy in any other position the employee is qualified to fill, in the agency in which he had been employed prior to his appointment, or shall have his name placed on a reemployment list. No appointing authority who has removed such an employee as herein provided may exercise such right of removal again with respect to any other employee in the same position within three calendar months after such original removal, except with the consent of the commissioner of administrative services. No provision of this section shall be construed to prevent any employee in the unclassified service from competing for positions in the classified service if he possesses the minimum qualifications established by the commissioner of administrative services, except that no such employee shall be eligible to compete in a promotional examination unless a minimum of four qualified applicants file. In the certification of names of persons eligible for appointment, sex shall be disregarded except when otherwise provided by statute or upon request of the appointing authority subject to the approval of the commissioner of administrative services.

Sec. 5-229. Time for appointment. Effective date. An appointing authority, upon receipt of certification of eligibles for appointment to the classified service, shall appoint such an eligible person within a reasonable time fixed by the commissioner of administrative services, except that appointment of such an eligible person need not be made if said commissioner of administrative services, upon good cause shown, approves the request of an appointing authority that no appointment be made. Such appointment shall be effective on the date designated by the appointing authority. If the appointing authority is unable to make arrangements with a person whose name has been certified to begin work within a period of time which he considers reasonable, he shall report such fact to the commis-

sioner of administrative services, who may, in accordance with applicable regulations, certify the name or names of one or more additional eligible persons.

Sec. 5-230. Working test periods. The commissioner of administrative services shall establish appropriate working test periods of not less than three months nor more than one year for the various classes of positions. Within ten days preceding the termination of the working test period, and at such other times as the commissioner of administrative services requires, the appointing authority shall report to the commissioner of administrative services whether such employee is able and willing to perform his duties in a manner so as to merit permanent appointment. The requirement as to such reports for positions involving unskilled or semiskilled labor or domestic, attending or other housekeeping and custodial service at institutions may be waived. At any time during the working test period, after fair trial, the appointing authority may remove any employee if, in the opinion of such appointing authority, the working test indicates that such employee is unable or unwilling to perform his duties so as to merit the continuance in such position and shall forthwith report his action to the commissioner of administrative services. The name of any employee so removed, but who is considered by the commissioner of administrative services to be suitable for employment in some other department, agency or institution, may be restored to the employment list. For the purposes of this section any employee who has served part of a working test period in a position in the classified service who is, pursuant to examination, appointed to, and serves part of a working test period in, a position in a higher classification in a field of work directly related to his prior position, from which new position he is dismissed, shall, at his option, be reappointed to the position which he first had and his service in the working test period for such first position shall be deemed to include the time spent in the working test period for the higher position.

* * *

Sec. 5-272. Prohibited acts of employers and employee organizations.

* * *

(d) Nothing herein shall diminish the authority and power of the personnel appeal board, the department of administrative services or any state agency established by statute, charter or special act to establish, conduct and grade merit examinations and to rate candidates in order of their relative excellence from which appointments or promotions may be made to positions in the competitive division of the classified service of the state served by the department of administrative services. The establishment, conduct and grading of merit examinations, the rating of candidates and the establishment of lists from such examinations and the appointments from such lists shall not be subject to collective bargaining.

* * *

Sec. 46a-68. (Formerly Sec. 4-61s). State affirmative action plans; filing; monitoring; reports; regulations. (a) Each state agency, department, board and commission shall develop, in cooperation with the commission on human rights and opportunities, an affirmative action plan for equal employment opportunity in all aspects of personnel and administration. Such plan shall be developed pursuant to regulations adopted by the commission on human rights and opportunities in accordance with chapter 54 to ensure that affirmative action is undertaken as required by state and federal law to provide for equal employment opportunities and to comply with all responsibilities under the provisions of sections 46a-54 to 46a-64, inclusive, and sections 46a-70 to 46a-78, inclusive.

(b) Each state agency, department, board and commission shall file an affirmative action plan developed in accordance with subsection (a) of this section with the commission on human rights and opportunities, semiannually, on or before March first and September first of each year, except that any state agency, department, board or commission which has an

affirmative action plan approved by the commission may be permitted to file its plan on an annual basis in a manner prescribed by the commission.

(c) The commission on human rights and opportunities shall review and approve the content of such affirmative action plans within seventy-five days of the submission of each plan to the commission.

(d) The commission on human rights and opportunities shall monitor the activity of such plans within each state agency, department, board and commission and report to the governor and the general assembly on or before April first of each year concerning the results of such plans.

(e) The commission on human rights and opportunities shall adopt regulations, in accordance with chapter 54, to carry out the requirements of this section.

Sec. 46a-69. Discriminatory practices by state. It shall be a discriminatory practice to violate any of the provisions of sections 46a-70 to 46a-78, inclusive.

Sec. 46a-70. (Formerly Sec. 4-61c). Guarantee of equal employment in state agencies. (a) State officials and supervisory personnel shall recruit, appoint, assign, train, evaluate and promote state personnel on the basis of merit and qualifications, without regard for race, color, religious creed, sex, age, national origin, ancestry, mental retardation or physical disability, including but not limited to, blindness, unless it is shown by such state officials or supervisory personnel that such disability prevents performance of the work involved.

(b) All state agencies shall promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state government. They shall regularly review their personnel practices to assure compliance.

(c) All state agencies shall conduct continuing orientation and training programs with emphasis on human relations and nondiscriminatory employment practices.

(d) The commissioner of administrative services shall insure that the entire examination process, including qualifications appraisal, is free from bias.

(e) Appointing authorities shall exercise care to insure utilization of minority group persons.

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NO. 80-2147

In The

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually And In His Official Capacity; AND EDWARD W. MAHER, Individually And In His Official Capacity,
Petitioners,

V.

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK AND LINDA BROOKS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED

In a Title VII action in which the final outcome of the employee selection process does not result in an adverse impact against the plaintiffs' minority group, can the plaintiffs make a *prima facie* showing of employment discrimination by merely establishing: (1) that they failed to succeed on a component of the selection process and thereby become ineligible to proceed further in the selection process and (2) that the results of such component had a disparate impact on plaintiffs' minority group?

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STATEMENT OF THE CASE

The respondents in this action are employees of the State of Connecticut who have worked in various positions within the State's Department of Income Maintenance for periods in excess of eight years. At the time this action was instituted, and for almost two years prior thereto, the respondents were successfully serving on a provisional basis in the positions of "Welfare Eligibility Technician Supervisors." Several of their superiors testified at trial that the respondents possessed the qualifications for permanent appointment as supervisors and praised their performance on the job.

The issue now before the Court arises from the claim of the black respondents, Winnie Teal, Gracie Clack, Rose Walker and Edith Latney, concerning the written examination used by the petitioners to screen candidates for promotion on a permanent basis to the positions of "Welfare Eligibility Technican Supervisor." The black respondents claimed that they were eliminated from consideration for promotion to these positions solely on the basis of the results of a written examination that discriminated against black candidates. This, they argued, constituted a violation of the provisions of Title VII of the Civil Rights Act of 1964, as amended. (Title 42 U.S.C. Section 2000e et seq.)[1]

The examination was administered on December 2, 1978 to 329 candidates. The mean score of the candidates taking the test was 70.4%. The black candidates, however, had a mean score 6.7 percentage points lower than white candidates, a disparity that the petitioners admitted was statistically significant. It was only after the individual tests of the candidates had been corrected and graded that the petitioners established a cut-off score

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[1] In bringing this suit, the black respondents were joined by four white plaintiffs who together claimed that the test in question violated provisions of state law which require promotional examinations to be job related.

to determine eligibility for promotion. No effort, what-so-ever, had previously been made by the petitioners to identify an appropriate cut-off score for this test. Even though knowing beforehand, that a cut-off score of 65 would eliminate from promotional eligibility a disproportionately large number of black candidates, the petitioners, nevertheless, set the score at 65. This score, the petitioners claimed, was set at a lower level than that suggested by the test statistics, but was used in an attempt to lessen the severity of the disparate racial impact had a higher cut-off score been used.

The test results, broken down by race, with the cut-off score set at 65 were as follows:

Candidate Group	No. taking test	No. Passing test	Percent passing test
Black	48	26	54.17
Hispanic	4	3	75.00
Indian	3	2	66.67
White	259	206	79.53
Unidentified	15	9	60.00
	329	246	74.77

These results revealed that the passing rate of the identified black candidates (54.17%) was approximately 68 percent that of the passing rate of the identified white candidates (79.53%). This disparity in the passing rates between black candidates and white candidates was of statistical significance. (Tr. 351-A, 352, (May 28, 1980)). In addition, the disparity in passing rates was violative of the four-fifths rule established by the Uniform Guidelines on Employee Selection Procedures, Title 29 C.F.R. Section 1607.4(d) (1979) for assessing adverse impact.

In determining eligibility for promotion pursuant to Connecticut's merit system, candidates who fail to achieve a passing grade are eliminated from all consideration for appointment. Those who attain a passing grade are ranked on an eligibility list in the order of their scores on the test. Candidates achieving the same point score are assigned the same rank. The State is then

allowed to choose for promotion from the candidates whose scores on the examination fall within a specified number of ranks. The number of ranks from which the State is allowed to choose varies in relation to the number of promotions to be made. This number of ranks is determined by adding four to the total number of vacancies to be filled. Those candidates falling within the number of ranks determined in this manner form an eligibility pool from which the petitioners, in their discretion, select candidates to fill the permanent positions.

In the present case, there were forty-six vacancies to be filled by promotion. Under State law, therefore, the petitioners, theoretically, could have chosen for promotion any candidate whose score placed him or her within the fifty highest ranks. However, because the scores of all the candidates were grouped into twenty-five ranks, the petitioners were permitted to choose for promotion from any of the passing candidates. Thus, all the candidates passing the test were eligible for promotion on an equal basis with each other, there being no requirement that appointments be made according to the rank order of the candidates. As acknowledged by the petitioners, the results of the test were used on a pass-fail basis. (Tr. 248, 249 (May 27, 1980); Tr. 314, 315, 355, 356 (May 28, 1980)).

Upon being informed that they had failed to attain a passing grade, and were thus not eligible for promotion, the respondents commenced the instant action in the Federal District Court for the District of Connecticut on April 6, 1979. Prior to bringing the action in Court, the respondents also filed administrative complaints with the State of Connecticut Commission on Human Rights and Opportunities and the United States Equal Employment Opportunity Commission. They sought immediate relief from the Court in the form of a temporary restraining order to forestall their removal from the positions of Welfare Eligibility Technician Supervisors, in which they had been serving on a provisional basis. As a result of petitioners' representation that they would not remove the respondents from their provisional positions prior to a decision on the merits of the respondents' complaint, this request for temporary relief was never

acted upon by the District Court. No order was ever entered, and no agreement was ever reached, that prevented the petitioners from making permanent appointments to the other 46 or more positions. However, it was more than a year after this action was instituted, and approximately one month prior to trial, that the petitioners made their first promotions from the eligibility list generated by the written exam. Forty-six persons were promoted to permanent supervisory positions, 11 of whom were black and 35 of whom were white. Of the 48 identified black candidates who entered the selection process, 11 or approximately 33 percent, were promoted; of the 259 identified white candidates who applied, 35, or about 13.5 percent, were promoted. Thus, the actual promotion rate of blacks (23 percent) was approximately 170 percent that of the actual promotion rate (13.5 percent) of identified whites. Further, although black candidates comprised only 11 percent of the pool of eligible candidates formed from the results of the test, they made up, as a group, 24 percent of the final appointments, or more than twice their incidence in the eligibility pool would have statistically commanded. Forty-two percent of the eligible black candidates received final appointments as compared to seventeen percent of the eligible white candidates.

At trial and before the Court of Appeals, the petitioners claimed that in making the final appointments from the pool of eligible candidates they considered the past work performance of the candidates, recommendations of the candidates' supervisors, and to a lesser degree, the candidates' seniority. Although petitioners now state for the first time that ranking on the eligibility list as well as interest in the geographical area where the vacancies existed were also considered (Pet. Br. P. 3) there was no evidence presented at trial in support of these claims. As regards rank on the eligibility list, the facts show that the opposite is true. Once the list of eligible candidates was compiled, the rank order of the candidates on that list was no longer pertinent. Since the examination was, in effect, a pass-fail device, all candidates who passed the test presumably had an equal chance for selection. (Tr. 248, 249 (May 27, 1980); Tr. 314, 315, 355, 356, May 28, 1980)).

Additionally, in the final step of the promotional process, the petitioners again argued to both the District Court and the Court of Appeals that they utilized an affirmative action program to insure a large representation of minority candidates in the supervisory employment sphere. At page 16 of their brief to the District Court, which was repeated verbatim at page 9 of their brief to the Court of Appeals, the petitioners stated, in no uncertain terms, that,

> "Evidence presented at trial established that the examination given was only one component of the defendants' total selection process. Defendants also utilized an affirmative action program to insure a large representation of minority candidates in the supervisory employment sphere. The past work performance of candidates who passed the exam was considered, as well as recommendations from their supervisors, and to a lesser degree, the length of the candidates' services. Thus, the total selection process involved four components the written exam being just one."

Testimony to that effect was also given at trial. (Tr. 239, 248 (May 27, 1980)).

Now, before this Court, the petitioners, at Page 4, fn. 1 of their brief, take exception to the Court of Appeals statement that the petitioners employed an affirmative action program "to insure a large representation of minority candidates on the supervisory level." They further claim, for the first time, that the final appointments were made without regard for race or color. Petitioners' arguments to the District Court and the Court of Appeals, the testimony at trial concerning the permanent appointments, as well as the racial composition of the appointments themselves, clearly indicate that the appointments were made with an awareness of the candidates' race and color.

SUMMARY OF ARGUMENT

There is no dispute that the examination used by the petitioners to screen candidates for promotion to the positions of Welfare Eligibility Supervisor eliminated a disproportionate number of black candidates, including the respondents, from promotional consideration. As such, there exists no justification for using the results of this test in making employment decisions unless it is first proven to be job-related.

That the petitioners, in making promotions to the positions in question, appointed a greater percentage of black candidates than their incidence in the pool of eligible candidates would statistically command, does not negate the fact that the pool of eligible candidates, from which the appointments were made, was formed solely on the basis of the results of an examination that disproportionately excluded black candidates. The disproportionate selection of black candidates for permanent appointments from those black candidates who gained entry into the pool of eligible candidates by overcoming the discriminatory effects of the test does not remedy the disproportionate exclusion of black candidates from the eligibility pool in the first instance. Regardless of the number of black candidates finally being appointed by the petitioners, it remains undisputed that the respondents were denied entry into the pool of eligible candidates, and thus deprived of a promotional opportunity, solely on the basis of an examination that discriminated against black candidates. They remain the victims of racial discrimination whether or not the final selections evidence adverse impact.

The only justification advanced by the petitioners for using the results of this examination without first establishing its job-relatedness, is that in making appointments from the pool of eligible candidates, they selected sufficient numbers of black candidates from that pool so as to offset the disparate impact the examination had on black candidates. But this does nothing to redress the injury that the respondents would suffer in light of the test's disparate impact on black candidates, if, in fact, the test was unrelated to performance on the job, as is claimed

by the respondents. To adopt the position advanced by the petitioners, the Court would be sanctioning a practice that would permit an employer to screen candidates for promotion through the use of a discriminatory selection process, unrelated to job performance, if from those candidates who are fortunate enough to pass through that process, the employer weights its final promotional decisions so as to offset the purely numerical disparate impact of the screening device. Title VII of the Civil Rights Act of 1964, as amended, has not been and should not now be accorded such an interpretation.

Even if under a hypothetical set of circumstances the so-called "bottom line" defense possesses theoretical validity, it has no application to the facts of the present case. As noted, the selection process employed by the petitioners to determine eligibility for promotion consisted of a single component, the examination in question. Based on the results of the examination, a list of eligibles was compiled. From that list, the petitioners in their discretion, made selections. There was no other component or other tests that further screened the candidates who passed the exam in question. This case does not involve a selection process consisting of various sub-tests or components. Simply stated, concern about fragmenting a selection process into its various components or sub-tests is not present in this instant case.

Although they argued before both the District Court and the Court of Appeals that they employed an affirmative action program to insure a large number of minority candidates in supervisory positions, the petitioners, before this Court, retreat from that position and claim, instead, that appointments were made without reference to an individual's color or race. What should be apparent to the Court is that the petitioners played a numbers game on the eve of trial and — with an eye to the candidates' color — made the appointments they did, not in keeping with any affirmative action program, but simply in an effort to avoid liability to the respondents and circumvent the requirements of Title VII.

Also dictating against the recognition of a bottom line defense is the fact that the petitioners knew full well when they established a cut-off score for this examination that it adversely impacted upon black candidates. They selected a cut-off score, not before nor even at the time the test was held, but only after the individual candidates' tests had been graded and scored. In the least, the petitioners, having chosen a cut-off score that they knew beforehand would adversely impact upon black candidates, should be required to establish the job-relatedness or business necessity of that score.

For the first time before this Court, the petitioners claim that their actions have a cloak of immunity since the examination was administered as part of a bona fide merit system without intention to discriminate. Not having raised this issue either before the District Court, the Court of Appeals, or in their Petition for Certiorari, the petitioners are foreclosed from raising it. But assuming that at this late date, petitioners may raise this claim, it affords them no relief from liability since an examination which is not job-related and adversely impacts on black candidates, cannot be considered a part of a "bona fide" merit system.

ARGUMENT

I.

THE BLACK RESPONDENTS ESTABLISHED A PRIMA FACIE CASE OF RACIAL DISCRIMINATION IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED.

A. A Prima Facie Case Of Racial Discrimination In Violation Of Title VII Is Established By Proving That The Results Of A Promotional Examination Adversely Impacts Upon Black Candidates.

A disparate impact analysis is the proper method for evaluating the legal validity under Title VII of employment practices that are facially neutral in their treatment of different groups of individuals, but that in fact fall more harshly on one group than another. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 335, 336, fn. 15 (1977). Under this approach, the plaintiff is first required to establish a prima facie case on the basis of disparate impact, and then the defendant is required to rebut the plaintiff's case by proving that the disparity results from legitimate, job-related selection procedures. Proof of discriminatory motive is not required.

> "...Congress 'proscribed not only overt discrimination but also practices that are fair in form, but discriminatory in operation'...Thus the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group..." *Teamsters,* supra at p. 349. (Citations omitted).

In order to establish a prima facie case under a disparate impact analysis, the plaintiff must prove "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."

Albemarle Paper Company v. *Moody,* 422 U.S. 405, 425, (1975).

B. The Respondents Proved That They Were Excluded From A Promotional Eligibility Pool Due Solely To The Results Of An Examination That Had A Disparate Impact Adversely Affecting Black Candidates.

To qualify for appointment to the promotional position of Welfare Eligibility Technician Supervisor, candidates were required to pass a written examination. Those candidates who passed the examination formed an eligibility pool from which the petitioners were allowed, under state law, to select candidates for appointment. On the other hand, those candidates who failed the examination were excluded from the eligibility pool and thus eliminated from promotional consideration. The examination acted as a pass-fail barrier beyond which failing candidates were not permitted to proceed.

There exists no dispute over the fact that the examination in this case produced a disparate impact adversely affecting black candidates. As both the District Court and the Court of Appeals found, the black respondents were eliminated from the promotional eligibility pool solely as a result of an examination that disproportionately excluded black candidates. Thus, under a disparate impact analysis, a prima facie violation of Title VII was established, leaving the petitioners the burden of proving the test's job-relatedness.

C. The Same Considerations That Led The Supreme Court To Hold The Tests In *Griggs* To Be Discriminatory Are Present With Respect To The Examination Used By Petitioners In This Case.

As Justice Powell stated in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 806 (1973),

> "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."

Petitioners claim that these concerns are not present in this case. They argue that "Connecticut, like many other states, has never had a dual system as to which it could be said that the education of blacks was, on account of their race, inferior and culturally deprived." (Pet. Br. p. 18) However, before the District Court, the Petitioners' own witnesses contradicted the argument now advanced by the petitioners. The Chief Personnel Psychologist for the State of Connecticut testified that examinations like the one in the present case tend to produce an adverse impact on black candidates because "there are cultural differences in the environment that Connecticut has, that just about every state in the Union has, that give minority candidates a lesser opportunity for a solid education, a lesser opportunity at just about anything that involves what white — your white middle class people have — had the privilege of having for a hundred years." (Tr. 353, 354 (May 28, 1980)).

Similarly, Dr. Joel Peter Wiesen, the head of test development and validation for the State of Massachusetts, who was called as an expert witness for the petitioners, testified that the examination used in this case would normally produce an adverse impact on black candidates because "we have in this country, going back several hundred years, a history of disparate treatment of minority groups." In his opinion, black Americans have not yet recovered from the effects of slavery, which was a particularly harsh form of slavery in this country, where slaves were deprived of educational opportunities. (Tr. 94 (May 27, 1980)).

These are exactly the same considerations that led this Court to rule illegal the tests in *Griggs* v. *Duke Power Company,* 401

U.S. 424 (1971). The respondents are no less the victims of discrimination than the plaintiffs in *Griggs*.

D. Petitioners' Appointments Of Candidates From A Promotional Eligibility Pool Formed Solely On The Basis Of The Results Of An Examination That Disproportionately Excluded Black Candidates Is Not Relevant To Respondents' Claims Of Discrimination In Being Excluded From The Promotional Eligibility Pool In The First Instance.

Based on the results of the examination, an eligibility pool, consisting of 239 successful candidates, identifiable as to race, was formed. Of the 239 candidates, 26 or 10.9 percent were black, and 206 or 86 percent were white. From this pool the petitioners, in April of 1980, being more than one year after this action was instituted and only one month prior to the trial on the merits of respondents' claims, made the first appointments from the eligibility pool. The petitioners appointed 46 candidates, of which 11 or 23.9 percent were black, and 35 or 76.1 percent were white. The selection rate of black candidates from the eligibility pool was 42.3 percent as compared to the selection rate of 17 percent for white candidates. The petitioners claim before this Court that these selections were made without regard to a candidate's race or color.

That the petitioners appointed a greater percentage of black candidates than their incidence in the pool of eligibles would statistically command, does not negate the fact that the pool of eligible candidates, from which the appointments were made, was formed solely on the basis of the results of an examination that disproportionately excluded black candidates. The disproportionate selection of black candidates for permanent appointments from those black candidates who gained entry into the eligibility pool by overcoming the discriminatory effects of the test does not remedy the disproportionate exclusion of black candidates from the eligibility pool in the first instance. Regardless of the number of black candidates finally appointed by the petitioners, it remains undisputed that the respondents were

denied entry into the pool of eligible candidates, and thus deprived of promotional opportunities, solely on the basis of an examination that discriminated against black candidates.

The only justification advanced by the petitioners for using the results of this examination without first establishing its job-relatedness, is that in making appointments from the pool of eligible candidates, they selected sufficient numbers of black candidates from the pool so as to offset the disparate impact the examination had on black candidates. But this does nothing to redress the injury that the respondents would suffer in view of the test's disparate impact on black candidates, if, in fact, the test was unrelated to performance on the job, as is claimed by the respondents.

To adopt the position advanced by the petitioners, the Court would be sanctioning a practice that would permit an employer to screen candidates for promotion by use of a discriminatory process, unrelated to the requirements of the job, if, from those candidates who are fortunate enough to pass through that process, the employer weights its final promotional decisions so as to offset the purely numerical disparate impact of the screening process. Title VII has not been, and should not now be, accorded such an interpretation.

> "Permitting the overall selection process result in this case to validate what may be the denial of an employment opportunity to a disproportionate number of black candidates is an expedient that transgresses the purpose of Title VII. Where an employment practice forecloses a disproportionate number of persons in a protected group from a job opportunity, it matters very little to the victimized individuals that their group as a whole is well represented in the group of hirees." *Teal* v. *Connecticut,* 645 F2d 133, (2d Cir. 1981)

See also *League of United Latin American Citizens* v. *City of Santa Ana,* 410 F. Supp. 873 (C.D. Calif. 1976) and *E.E.O.C.* v. *Trailways, Inc.,* 27 FEP Cases 801 (D.Colo. 1981)

(1). A Disparate Impact Analysis Of Claims Of Racial Discrimination In Violation Of Title VII Focuses On The Exclusionary Effects That Facially Neutral Employment Practices Have On Members Of A Protected Group.

Commencing with its decision in *Griggs* v. *Duke Power Company,* supra, this Court has been consistent in holding that employment practices which disproportionately *exclude* minority applicants from employment opportunities are presumptively violative of Title VII unless such practices are shown to bear a demonstrable relationship to successful performance of the job for which they are used.

> "Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has — to resort again to the fable — provided that the vessel in which the milk is proffered be one that all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice *which operates to exclude* Negroes cannot be shown to be related to job performance, the practice is prohibited." *Griggs* v. *Duke Power Company,* supra, at p. 431. (Emphasis supplied)

The Court used the following language in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802, fn. 14 (1973) in addressing the question of what devices may properly be used to test qualifications for employment:

> "We note that the issue of what may properly be used to test qualifications for employment is not present in this case. Where employers have instituted employment tests and qualifications with an *exclusionary*

> *effect* on minority applicants, such requirements must be 'shown to be a demonstrable relationship to successful performance of the jobs' for which they were used..." (Citations omitted.) (Emphasis supplied)

The Court went on to explain its holding in *Griggs,* supra.

> "But *Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, *operated to exclude many blacks who were capable of performing effectively in the desired positions. Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives..." *McDonnell Douglas Corp.* v. *Green,* supra at 806 (Emphasis supplied)

And again in *International Brotherhood of Teamsters* v. *United States,* 341 U.S. 324, 348, 349, the Court stated that:

> "[t]he primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens'...To achieve this purpose, Congress 'proscribe[d] not only overt discrimination but also practices that are fair in form but *discriminatory in operation*'...Thus, the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group..." (Citations omitted)

See also the concurring opinion of Justice Marshall in *Furnco Const. Corp.* v. *Waters,* 438 U.S. 567, 583, (1978):

> "Where the Title VII claim is that a facially neutral employment practice actually falls more harshly on one racial group, thus having a disparate impact on that group, our cases establish a different way of proving the claim...As set out by the Court in *Griggs* v. *Duke Power Company,* supra, to establish a prima facie case on a disparate impact claim, a plaintiff need not show that the employer had a discriminatory intent but need only demonstrate that a particular practice in actuality 'operated to exclude Negroes'..." (Citations omitted)

And see also the dissenting opinion of Justice White in *New York City Transit Authority* v. *Beazer,* 440 U.S. 568, 598 (1979):

> "In a disparate impact hiring case such as this, the plaintiff must show that *the challenged practice excludes members of a protected group* in numbers disproportionate to their incidence in the pool of potential employees..." (Emphasis supplied)

Also in *Dothard* v. *Rawlinson,* 433 U.S. 321, (1977) the Supreme court ruled that the statutory height and weight requirements for employment as a correctional counselor with the Alabama Board of Corrections were violative of Title VII in that these requirements worked disproportionately to exclude women from eligibility for employment. Although these facially neutral employment standards were but two of various eligibility requirements, id at p. 327, the Court focused on the exclusionary effects of the height and weight requirements in ruling that they were violative of Title VII.

> "The gist of the claim that the statutory height and weight requirements discriminate against women does not involve an assertion of purposeful discriminatory motive. It is asserted, rather, that these facially neutral qualification standards work in fact disproportionately to exclude women from eligibility for employment by

> the Alabama Board of Corrections." *Dothard* v. *Rawlinson,* supra at p. 328, 329.

As in the present case, the facially neutral qualification standards in *Dothard* constituted a pass-fail barrier which disproportionately excluded members of a protected class from eligibility for employment. The controlling statistics were those that demonstrate the disproportionate exclusion of women from eligibility for employment. Once the plaintiffs established this disproportionate effect, a prima facie case of employment discrimination was proved and it became the defendants burden to establish business necessity. *Dothard* v. *Rawlinson,* supra.

The decision of the Court of Appeals takes cognizance of this Court's prohibition on the use of selection devices that have an exclusionary effect on black candidates where such devices cannot be shown to be job-related. Whereas, the bottom line theory advanced by the petitioners totally ignores the exclusionary effect the examination had on black candidates seeking entry into the promotional eligibility pool, it was this awareness that led the Court of Appeals to hold that the respondents established a prima facie case of racial discrimination, and not merely because it preferred the use of selection devices that rely on cumulatively scored components to those that rely on components which act as individual pass-fail barriers.

(2). Title VII Is Concerned With The Protection Of *Individuals* From Unlawful Discrimination.

As noted by the Court of Appeals, the bottom line theory in the context of this case would wrongfully overlook the rights of individuals in favor of the rights of "faceless groups."

> "Where, however, an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process, a different result must obtain. Otherwise we would be adopting the position that regardless of the

> language of the statute Congress intended Title VII to protect faceless groups rather than individuals..." *Teal* v. *Connecticut,* supra at p. 138.

Such an approach would run counter to the fundamental principle underlying Title VII, that is, equality of treatment for individuals. It was for the purpose of protecting the rights of individuals from unlawful discrimination that Title VII was enacted.

> "The statute makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.' 42 U.S.C. Section 2000e-2(a)(1) (emphasis added) The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class...Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes..." *City of Los Angeles* v. *Manhart,* 435 U.S. 702, 709 (1978)

Although a "disparate treatment" case, the language employed by the Court in *Furnco Const. Corp.* v. *Waters,* supra at p. 579 is equally applicable to the present case.

> "A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.***It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force. See *Griggs* v. *Duke Power Co.,* 401 U.S. at 430; *McDonald* v. *Sante Fe Trail Transportation Co.,* 427 U.S. 273, 279 (1976)."

(3). The "Bottom-Line" Theory Misconstrues This Court's Holding In *Griggs* v. *Duke Power Company*, Supra.

This case, as did *Griggs*, concerns the legality under Title VII of an "employment test." In *Griggs*, supra the Court held that

> "Title VII forbids the use of *employment tests that are discriminatory in effect* unless the employer meets 'the burden of showing that any given requirement [has]... a manifest relation to employment in question.'" *Albemarle Paper Company* v. *Moody*, supra at p. 425 (Emphasis supplied)

The Court based its decision on its reading of the testing provision of Section 703(h) of Title VII, which specifically concerns the legality of employment tests.

> "In *Griggs*, the Court was construing 42 U.S.C. Section 2000e-2(h), which provides in pertinent part that it shall not 'be unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.'" *Albemarle Power Company* v. *Moody*, supra, at p. 425 fn 21.

The fact that an examination may be one component of a multiple component selection process does not change the requirements of Section 703(h). Section 703(h) does not permit the use of discriminatory employment tests. If an examination produces a disparate impact, then under Section 703(h), it must be shown to be job related.

> "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is the giving of these devices

> controlling force unless they are demonstrably a reasonable measure of job performance." *Griggs,* supra at p. 436.

The petitioners argue that the following language from *Albemarle Paper Company* v. *Moody,* supra at p. 425

> "This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination — has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."

represents this Court's sanctioning of the bottom-line theory. But this language must be read in the context it was used, which was in reference to the holding in *Griggs,* supra. It states no more than that before an employer is required to prove the job-relatedness of an employment test, the complaining party must first establish a prima facie case, i.e. the *test* has in fact produced discriminatory results. There is no basis to construe this language as meaning the discriminatory results of an employment test are to be countenanced, regardless of the test's job-relatedness, because the overall selection procedure, consisting of what may be other non-testing components, produces no disparate results. Such a view loses sight of the fact that it is a specific section of Title VII, Section 703(h), that requires the examination portion of the selection procedure to be job-related, if that examination discriminates in effect.

II.

EVEN ASSUMING THAT UNDER A GIVEN SET OF CIRCUMSTANCES THE SO-CALLED "BOTTOM LINE THEORY" POSSESSES THEORETICAL VALIDITY THIS IS NOT AN APPROPRIATE CASE FOR ITS APPLICATION.

A. The Present Case Does Not Involve A Multiple Component Selection Process.

The present case involves a selection procedure employed by the petitioners to determine promotional eligibility which procedure consisted of a single component, the test in question. This is not a case challenging a single component of a multiple component selection process. See e.g. *Williams* v. *City of San Francisco,* 483 F. Supp. 335 (N.D. Calif. 1979) Concern about fragmenting a multiple component selection process into its various sub-components is not present in this case. The selection process involved a written test and the discretionary selection by the petitioners of individuals from those candidates who passed the test. There was no other component for determining eligibility other than the examination. Although petitioners testified at trial that in making the final selections they considered past work performance, supervisor's recommendations and to a lesser degree seniority, as well as applying an affirmative action program, these considerations cannot be viewed either cumulatively as a separate component, or individually as various components, of a multiple component selection process.

B. Petitioners' Final Selections Were Made In The Face of Litigation And Do Not Relieve Them Of Liability To The Respondents.

1. Petitioners' Motivation In Making Their Final Selections Is Suspect In View Of The Timing Of Such Appointments.

The petitioners' motivation in making their final selections from the eligibility pool must be regarded with skepticism in

view of the timing of such appointments. Although they were under no restraint, be it by Court order or by agreement between the litigants, (See P. 3, 4, supra) prohibiting them from making promotions, the petitioners refrained from making any appointments for more than one year after this action was commenced. It was only when trial on the merits was imminent (approximately one month prior to trial) that the petitioners made their first appointments.

Taken alone, the timing of petitioners' appointments would not support a finding that their action was taken in the face of litigation, but together with the evidence discussed infra, this is the only reasonable conclusion that can be reached.

2. Petitioners' Selection of Candidates Was Not Made Pursuant To An Affirmative Action Program.

Before the District Court and the Court of Appeals the petitioners argued that they utilized an affirmative action program to insure a large representation of minority candidates in the supervisory sphere. (See p. 5, supra). The clear implication of their arguments was that some type of relief was given by the petitioners to black candidates pursuant to an affirmative action plan or program in order to erase the disparate impact the examination had on black candidates. However, before this Court, the petitioners retreat from this claim, and instead, now make the claim that it must be presumed that the successful candidates were promoted on the basis of merit and qualification, without regard for race or color. (Pet. br. p. 4, fn 1) Indeed, they take exception with the statement made by the Court of Appeals that the petitioners employ an affirmative action program "to insure a large representation of minority candidates on the supervisory level." *Teal* v. *Connecticut,* supra at p. 135. But this is the very language used by the petitioners in making their claims before both the District Court and the Court of Appeals.

From their retraction, it is evident that no relief, pursuant to an affirmative action program in effect at the time of these appointments, was given by petitioners to black candidates, although, as discussed infra, the State did in fact weigh its appointments in this case to favor black candidates contrary to petitioners' assertion that these appointments were made without regard to color or race.

3. Color Was Made A Consideration By The Petitioners In Determining The Final Selections.

The petitioners' claim that the successful candidates were promoted without regard for race or color is clearly contrary to the facts involved in this case, which establish that the color of the candidates was considered in making the present appointments. First, the gross disparity between the selection rates of white candidates from the eligibility pool (17%) as compared to that of the black candidates (42.3%) alone would be sufficient to show that the final selections did not occur by random chance. (See pp. 4, 12, supra) Secondly, the testimony elicited at trial also establishes that considerations of color were involved in the final selections. (Tr. 238, 248 (May 27, 1980)) And thirdly, petitioners' briefs to the District Court and the Court of Appeals must be viewed as an admission to the fact that the color of the candidates was considered in making their final selections, although, as now admitted by the petitioners, not pursuant to any plan or program of affirmative action.

4. Petitioners' Final Selections Were Made Merely To Avoid Liability To The Respondents In This Case.

Based upon the timing of these appointments and the fact that they were weighted so heavily in favor of the black candidates who entered the eligibility pool, the only reasonable conclusion that can be reached is that the petitioners made these appointments in the face of litigation in an effort to extinguish respondents' claims of discrimination. The petitioners cannot

seriously dispute that black candidates were given preference over white candidates in the final selection decisions. Since this preference was given not as a result of a program of affirmative action, no other plausible reason exists for such preferential treatment other than that it constituted a last minute effort by the petitioners to avoid liability in this case. There can be no other conclusion, based on the evidence before the Court, that the appointment decisions made by the petitioners were inspired by the instant suit. As such, they do not relieve the petitioners of liability to the respondents. See *United States* v. *Oregon Medical Society,* 343 U.S. 326, 333 (1952); *Teamsters* v. *United States,* 431 U.S. 324, 341-342, (1977); *E.E.O.C.* v. *Local 14, Intern. Union of Op. Eng.,* 553 F2d 251, 254 (2d Cir. 1977); *James* v. *Stockham Valves and Fittings Co.,* 559 F2d 310, 325 (5th Cir. 1977).

C. Because The Petitioners Knew Beforehand That The Test Grade Selected As A Cut-Off Score Would Disproportionately Exclude Black Candidates, They Are Required To Prove The Tests's Job-Relatedness Regardless Of The Racial Composition Of Their Final Selections.

The petitioners claim that extensive preparation went into the construction of the examination in question. However, during the test construction phase no effort was made to determine an appropriate cut-off score for the examination. Even as of the date the test was given, a cut-off score had not been selected. The passing score was left undetermined until after the tests of the individual candidates had been corrected and scored. Thereafter, petitioners selected a cut-off score knowing beforehand that the score they chose would eliminate a disproportionate number of black candidates from promotional eligibility. Under such circumstances, the petitioners are required to prove the business necessity of the test. For if the test is not job-related, then clearly it has been "used" to discriminate against black candidates in violation of Section 703(h) of Title VII.

III.

SECTION 703(h) OF TITLE VII DOES NOT RELIEVE THE PETITIONERS OF LIABILITY TO THE RESPONDENTS WHOSE CLAIMS OF DISCRIMINATION ARE BASED ON PETITIONERS USE OF A DISCRIMINATORY EXAMINATION.

A. Having Failed To Raise The Claim That The "Merit System" Clause Of Section 703(h) Of Title VII Relieved The Petitioners Of Liability In This Case Either Before The District Court, The Court Of Appeals, Or In Their Petition For Certiorari, The Petitioners Cannot Now Raise This Issue For The First Time Before This Court.

Absent exceptional circumstance, issues not raised before the District Court or the Court of Appeals will not be considered on review by the Supreme Court. *United States* v. *Estate of Donnelly,* 397 U.S. 286, 295 fn 5 (1969); *Neely* v. *Martin K. Eby Construction Co.,* 386 U.S. 317, 331 (1967). The issue now raised by the petitioners concerning the effect of the "merit system clause" of Section 703(h) of Title VII had not been previously raised either before the District Court or before the Court of Appeals. Further, this issue was not raised in their petition for certiorari, in which the only question presented by the petitioners concerned the so-called "bottom-line theory." And it is only in the most exceptional of cases that the Court will consider issues not raised in the petition for certiorari. *Stone* v. *Powell,* 428 U.S. 465, 482 fn. 15 (1976); *United States* v. *Ortiz,* 422 U.S. 891, 899.

B. A Promotional System That Relies On The Results Of A Discriminatory Examination For Determining Eligibility Cannot Be Considered A "Bona-Fide Merit System" Within The Meaning Of Section 703(h) Of Title VII.

The first sentence of Section 703(h) is comprised of two major clauses, the first dealing with bona fide seniority and

merit systems, the second dealing with professionally developed ability tests. Under the second or "testing" clause of Section 703(h), action based on the results of employment tests may not lawfully be "used to discriminate." Ever since this Court's decision in *Griggs* v. *Duke Power Co.*, supra, it has been clear that testing practices are judged by their impact. Proof that an examination produces a disparate impact adversely affecting black candidates is sufficient to make out a prima facie case of discrimination. *Griggs* v. *Duke Power Co.*, supra; *Albemarle* v. *Moody*, supra; *Teamsters* v. *United States*, supra; *Dothard* v. *Rawlinson*, supra.

Nevertheless, petitioners contend that the procedure for determining promotional eligibility on the basis of the results of an examination is a "bona fide merit system" which is protected by the first clause of Section 703(h) regardless of the impact, unless the system was used with intent to discriminate. But under respondents' reading of Section 703(h) the first clause of Section 703(h) would swallow up the meaning of the second clause which explicitly forbade the *use* of testing results to discriminate.

The bona fides of a merit system must be judged by applying the *Griggs* impact and job-relatedness standards. *Guardians Ass'n of New York City* v. *Civil Serv.*, 633 F2d 232 (2d Cir. 1980); *Dickerson* v. *United States Steel Corp.*, 472 F.Supp. 1304 (E.D.Pa. 1978); *League of United Latin American Citizens* v. *City of Santa Ana*, 410 F. Supp. 873, 910 n.28 (C.D.Cal. 1976)

> "Once it has been determined that an examination has a disproportionate impact on minority groups and that it is not job-related, one cannot logically characterize a system of hiring solely on the basis of the results of the test as a 'merit' system — for whatever the test does measure it does not have merit; it does not measure fitness for the job in question, which is surely the only logical meaning of the term 'merit' in the hiring context. Section 703(h) makes sense only if the term 'bona

> fide merit system' is understood to refer to merit in areas related to the necessities of the business, not 'merit' in the abstract..." *Guardians Ass'n of New York City* v. *Civil Serv.*, supra at p. 253.

In the present case, respondents have already proved the results of the promotional test had a disparate impact on black candidates. If, after further proceedings, the test is ultimately determined not to be job-related, it cannot then seriously be claimed that the examination, which does not measure "merit," is part and parcel of a bona fide merit system.

CONCLUSION

For the reasons discussed, the holding of the Court of Appeals should be affirmed and this case be remanded to the District Court for further proceedings consistent with the decision of the Court of Appeals.

Supreme Court, U.S.
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NO. 80-2147

In The

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually And In His Official Capacity; AND EDWARD W. MAHER, Individually And In His Official Capacity,

Petitioners,

V.

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK AND LINDA BROOKS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

ARGUMENT

I.

THE DISPARATE IMPACT OF THE RESULTS OF THE EMPLOYMENT TEST ON A GROUP TO WHICH THE RESPONDENTS BELONG SHOULD NOT BE EQUATED WITH A DISCRIMINATORY SELECTION PROCESS

The respondents equate the disproportionate or disparate impact of the Welfare Eligibility Supervisor examination on black candidates with a racially discriminatory selection process. (Brief of Respondents, pp. 6-7, 13). In so doing they confuse two separate concepts, that of disparity and that of discrimination. "Disparity" means "dissimilar" or "essentially different." Random House Dictionary of the English Language (1966). The group of blacks who passed the Welfare Eligibility Supervisor examination was distinct or different from the group of whites who passed the examination in the sense that the black group represented 54.17 percent of the blacks who took the examination while the white group represented 79.53 percent of the whites who took the examination. That is not to say, however, that the examination, therefore, discriminated against blacks on account of their race.

To "discriminate" is "to make a distinction in favor of or against a person or thing on the basis of the group, class or category to which the person or thing belongs, rather than according to actual merit...." Random House Dictionary of the English Language (1966). The interpretative memorandum of the bipartisan floor captains for Title VII, Senators Case and Clark, defined "to discriminate" to mean "to make a distinction, to make a difference in treatment or favor...." 110 Cong. Rec. 7213 (1964). Any distinctions which the Welfare Eligibility Supervisor examination made among examinees were made on the basis of the ability to answer the examination questions and were not made on the basis of the race to which any examinee belonged. Nor can it be said that the lower level of performance of the black group was related to their blackness in any way.

That circumstance distinguishes this case from cases such as *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), where the poorer performance of blacks was directly related to their race. In those cases the blacks on whom the employment tests adversely impacted had been segregated by law, on account of their race, in inferior schools in North Carolina. See *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 430. North Carolina had, by use of such schools, "systematically deprived its black citizens of the educational opportunities it granted to its white citizens." *Gaston County, North Carolina* v. *United States*, 395 U.S. 285, 296-297 (1969). Connecticut has never had segregated schools and there is no basis for any determination by the Court. There was no determination below that the black respondents in this case received educations inferior to the white candidates on account of their race[1] or that their failure to pass the written examination was in any way whatsoever connected to their race.[2]

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[1]According to the 1970 census, 57 percent of white persons 25 years of age or older in Connecticut had completed 4 years of high school or more and 39.7 percent non-white persons had done so. White persons 25 years of age or over had completed a median of 12.2 years of school and non-whites a median of 10.9 years. U.S. Bureau of Census, 1970 Census of Population: Vol. 1, Characteristics of the Population, pt. 8, Table 46. In contrast, as the Court pointed out in *Griggs*, 34 percent of white males in North Carolina had completed high school according to the 1960 census, but only 12 percent of non-white males had done so. *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 430 n. 6.

[2]In *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) the State of Alabama's 5'2" height requirement and 120 pounds weight requirement for correctional counselors together excluded less than one percent of the male population and 41 percent of the female population. Clearly, height and weight are physically connected to gender. The Court recognized that when it said that there was "no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population." *Id.* 433 U.S. at 330. Test performance is not physically related to race.

If persons over forty had done more poorly on the test than others, or American citizens of Italian ancestry had done more poorly than others,[3] the Court would not attribute such results to their age or national origin. Neither should the Court attribute the poor performance of blacks on a test to their blackness, absent the circumstances present in *Griggs* and *Albemarle.* "Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." *City of Los Angeles, Dept. of Water* v. *Manhart,* 435 U.S. 702, 709 (1978).

II.

THE RESPONDENTS HAVE MISCHARACTERIZED THE PETITIONERS' ACTIONS IN SETTING THE PASSING SCORE OF THE EXAMINATION AND IN MAKING PROMOTIONS AS BEING LITIGATION-ORIENTED

The passing score on this test was set by an objective, standardized method. The petitioner, Department of Administrative Services, generally sets a passing mark by determining, as to each question on the test, the percentage of examinees who answer the question correctly. The petitioner then computes the average of such percentages in order to determine the passing score. (Tr. 278 (May 28, 1980)). That was the method followed in this case. (Tr. 312-313 (May 28, 1980)). This yielded a passing score of approximately 66. The raw score was rounded off at 65 to reduce adverse impact. (Tr. 328 (May 28, 1980)).

It is in this sense, that of sensitivity to equal employment opportunity for minorities, that the petitioners' "affirmative action" should be understood. The respondents, on the other hand, allude to the testimony of the Personnel Director of the

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[3] "[T]he white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals." *Regents of University of California* v. *Bakke,* 438 U.S. 265, 295 (1978) (Opinion of Powell, J.).

Department of Income Maintenance that promotions were made not only with regard to the examination rankings, but also with regard to supervisory recommendations, affirmative action and job performance (Tr. 248 (May 27, 1980)) and claim that affirmative action was a facade for the arbitrary promotions of minorities to avoid liability. (Brief of Respondents, pp. 5, 7). However, there was no testimony by this or any other witness, or findings by the trier of fact, as to the nature or specifics of any "affirmative action" after the promulgation of the eligibility list. It must, therefore, be concluded that any affirmative action in this regard was in accordance with relevant law, particularly Conn. Gen. Stat. § 46a-70(a) which commands appointing authorities to "recruit, appoint, assign, train, evaluate and promote state personnel on the basis of merit and qualifications, without regard for race, [or] color...." See also Conn. Gen. Stat. § 5-195. (Brief of Petitioners, App., pp. 3a, 18a-19a). Any inference that the petitioners discriminated in favor of black persons for whatever reason so as to violate the state law and to subvert the integrity of the personnel system which they are bound to uphold is totally unwarranted.[4]

III.

THE RESPONDENTS HAVE MISCONCEIVED THE FOCUS OF THE DISPARATE IMPACT RULE

The petitioners acknowledge that Congress was concerned not only about intentional discrimination against protected class members, but also about the integration of minorities into the skilled workforce and the economic mainstream and wished to eliminate racially-stratified job environments. (Brief of Petitioners, pp. 15-16 and cases cited therein). The petitioners do

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[4]In the absence of clear evidence to the contrary, state officials such as the petitioners are presumed to have discharged properly their official duties. *Citizens To Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 415 (1971); *United States* v. *Chemical Foundation,* 272 U.S. 1, 14-15 (1926); see also *Balch Pontiac-Buick, Inc.* v. *Commissioner of Motor Vehicles,* 165 Conn. 559, 568, 345 A.2d 520, 525 (1973).

not ask the Court to disregard totally statistics as to how the black group of candidates for Welfare Eligibility Supervisor fared in the selection process in relationship to the white group. But petitioners submit that, consistent with this legislative purpose, the Court should consider the end result of an employee selection process in determining whether to require, under a disparate impact theory, a showing of the job relatedness of any component of that process.[5] If the right of a member of a protected class to relief is to be derived from statistics as to how his protected class fared, then the Court should advert to how such class ultimately fared in the employee selection process, in penetrating the job area in question, rather than to how the protected class fared on a single segment of the process.

> Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet "the burden of showing that any given requirement [has]...a manifest relation to the employment in question. *Griggs* v. *Duke Power Co., supra,* at 432."

Dothard v. *Rawlinson, supra,* 433 U.S. at 329.

No one can quarrel with the Court of Appeals' statement upon which the respondents seized (Brief of Respondents, p. 13) that "it matters very little to the victimized individuals that their group as a whole is well represented in the group of hirees." *Teal* v. *Connecticut,* 645 F.2d 133, 140 (2d Cir. 1981). However, the Court of Appeals should not have held that the respondents made a prima facie showing that they were "victimized" by racial discrimination merely by establishing that

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[5]The factual issues and the nature of the evidence presented will differ when plaintiff claims discriminatory treatment. See *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248, 252 n. 5 (1981).

the test results disparately impacted on their protected class.[6] In characterizing the black respondents as "victimized," the Court of Appeals overlooked the critical consideration that the disparate impact rule allows an individual to establish a prima facie case merely on the basis of statistics concerning the success of the members of a protected class and the individual's membership in that protected class. The rule requires no evidence of the group's, or any individual's, educational opportunities, work background or other life experiences, and no evidence of the relationship of these to failure or success in the employment process; rather the sole criterion for a prima facie case is the success or failure of the individual's protected group. In such circumstances that criterion should be focused upon what Congress focused upon, the success of the group in penetrating the job market. See *E.E.O.C.* v. *Greyhound Lines, Inc.*, 635 F.2d 188, 191 (3rd Cir. 1980); *E.E.O.C.* v. *Navajo Refining Co.*, 593 F.2d 988, 991-992 (10th Cir. 1979); *Friend* v. *Leidinger*, 588 F.2d 61, 66 (4th Cir. 1978); *Cormier* v. *P.P.G. Industries, Inc.*, 519 F.Supp. 211, 278-279 (W.D.La. 1981); Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law*, 12 N.C.Central L.J. 1 (1980).

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[6]Had 5 more black applicants passed the examination, and had all other factors remained unchanged, the passing rate of black candidates would have exceeded 80% of the passing rate of white candidates so as to comply with the "eighty percent rule" of the Uniform Guidelines used by the District Court to determine impact. See Brief of Petitioners, pp. 5-6. In such a case no respondent could have made out a prima facie case of disparate impact even under respondents' theory.

CONCLUSION

If the bare coincidence of relative lack of success of a racial, or religious, or gender, or national origin group in a job quest is to give rise to an inference of illegal discrimination against that group and its members, then the inference should be based on the ultimate success of that group in the job quest. For the reasons stated herein and in the petitioners' brief on the merits, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CONNECTICUT, *et al.*,
Petitioners,

v.

WINNIE TEAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS TO FILE A BRIEF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby moves for leave to file the accompanying brief *amicus curiae* in support of the position of the respondents in the instant case.

The AFL-CIO is a federation of 102 national and international unions with a total membership of approximately 14,500,000 workers. The men and women who belong to AFL-CIO unions are drawn from every race, religion and national origin. Precisely to assure each of

them the equal employment opportunity that is his or her natural right, the AFL-CIO was a moving force in the enactment of Title VII of the Civil Rights Act of 1964.

This case presents a question as to whether Title VII does provide that opportunity, or whether the Act permits employers to engage in practices that under settled analysis are discriminatory if the employer is nevertheless able to achieve an appropriate racial balance. That question is central to the meaning of Title VII. The concept of an employment policy designed to achieve racial balance and the concept of a non-discriminatory employment policy are incompatible. And, as we show in the accompanying brief *amicus curiae*, Congress' intent in enacting Title VII was to prohibit racial discrimination, not to mandate racial balance. Because the question here is of such moment to the proper implementation of Title VII, the AFL-CIO seeks this opportunity to state its views to the Court.

CONCLUSION

For the above stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO is set forth in that motion.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, as amended in 1972, is an anti-discrimination statute, designed to protect *individuals* against racial, religious, sexual and national origin discrimination in employment. And § 703(j) of the Act makes it plain that Title VII does

not require employers to achieve a racial balance in their workforces. Thus, ending "discriminat[ion] because of race," not achieving racial balance, is the command of Title VII.

Under the "bottom-line" theory, urged upon this Court by the State (the employer) and by the United States as the basis for reversing the court of appeals, acts of discrimination against individuals in promotion—at least where the discriminatory act is of the type dealt with under the disparate impact doctrine—are to be countenanced if an appropriate racial balance among those promoted is nevertheless achieved. In this case, the theory would mean that individual blacks victimized by a discriminatory test must go without a remedy because *other* blacks, not so victimized, were given a promotion as a result of dispaarte treatment victimizing whites. The theory thus reduces in this setting to the proposition that two wrongs make a right; a statute designed to prohibit and remedy discrimination against individuals, not to achieve racial balance, is turned into a statute that tolerates multiple acts of discrimination as long as the result is a racial balance.

This Court has on several occasions rejected the bottom-line theory as a defense to claims by victims of disparate treatment. *Furnco Construction Corp. v. Waters*, 438 U.S. 567; *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273; *Phillips v. Martin Marietta*, 400 U.S. 542. The proponents of the bottom-line theory urge that the result should be different when the individual's claim of discrimination is of a disparate impact violation, rather than of a disparate treatment violation. The analytic error that underlies this attempted distinction is the implicit assumption that the prohibition against disparate impact serves a different statutory purpose from that served by the prohibition against disparate treatment. Those who advocate the bottom-line theory proceed as if disparate impact analysis is a means for

achieving appropriate racial balances, rather than a means to prohibit and to remedy a particular type of discrimination against individuals. On this view, the disparate impact doctrine is at war with the basic approach of the statute. But disparate impact analysis is not simply a numbers game; as *Griggs v. Duke Power Co.*, 401 U.S. 424, and its progeny show, it is designed to address a particular and subtle form of employment discrimination.

While this Court has not yet drawn the precise boundaries of the disparate impact analysis, certain limits are clear. The analysis is meant to address the class of employment practices, that, while not designed or adopted in order to discriminate on the basis of race, are predicated on factors that are "artificial, arbitrary, and unnecessary" and that, because they are "traceable to race" and therefore "beyond [the] control" of the disadvantaged individuals, necessarily differentiate along racial lines. *Griggs*, 401 U.S. at 430-431; *McDonnell Douglas Corp. v. Green*, 411 U.S. at 806. Prohibiting this form of discrimination, not mandating racial balance, is the object of the disparate impact analysis.

The bottom-line theory looses the concept of disparate impact from its rationale. Rather than focusing on particular practices to determine whether they fit the rationale of *Griggs*, the bottom-line theory focuses on the ultimate result of what may be a number of discrete practices, and the issue becomes purely one of numbers, abstracted from causes or reasons. The end result of the bottom-line theory is to accomplish precisely what § 703(j) was meant to preclude: the individual is ignored in favor of the goal of racial balance.

ARGUMENT

1. Title VII of the Civil Rights Act of 1964, as amended in 1972, is an anti-discrimination statute. More specifically, it is a statute designed to protect *individuals* against racial, religious, sexual and national origin discrimination in employment. As this Court has stated:

> The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class. [*Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 708.][1]

As its means to that end, Title VII makes unlawful:

> "Disparate treatment" [which concerns instances wherein] the employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin [and where] proof of discriminatory motive is critical * * * [; and] "disparate impact" [which] involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and can-

---

[1] The Act makes this focus on the individual manifest. Section 703(a), the basic provision defining unlawful practices of employers, provides as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail to refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of employment, because of *such individual's* race, color, religion, sex, or national origin; or
>
> (2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of *such individual's* race, color, religion, sex, or national origin. [Emphasis added.]

And § 706(g), the basic remedial provision of Title VII, provides for monetary and injunctive remedies for those "individuals" who have been proved to be victims of violations of § 703.

> not be justified by business necessity [and where] proof of discriminatory motive * * * is not required * * *. [*Teamsters v. United States*, 431 U.S. 324, 335-336 n. 15.]

It is equally plain that Title VII does *not* require employers to achieve a racial balance in their workforces. Section 703(j) of the Act expressly states:

> Nothing contained in this title shall be interpreted to require any employer * * * to grant preferential treatment to any individual or to any group because of the race * * * of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race * * * employed by any employer * * * in comparison with the total number or percentage of persons of such race * * * in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Thus, ending "discriminat[ion] because of race," not achieving racial balance, is the command of Title VII.

2. In this case, both courts below found that four black plaintiffs had been excluded from competing for a promotion by a written examination that has a disparate impact adversely affecting blacks. Subsequent to their exclusion, the state agency that is the employer in this case, applying, as the court below found (645 F.2d at 135), the agency's "affirmative action program," promoted enough *other* blacks from among those who had passed the test so as to make the proportion of blacks promoted even greater than the proportion of blacks that had initially applied for the promotion. The question presented is whether the promotion of these other blacks extinguished the claims of the four plaintiffs here that they were victimized by the discriminatory examination. The court of appeals held that the plaintiffs' claims were *not* extinguished.

Under the "bottom-line" theory, urged upon this Court by the State (the employer) and by the United States as the basis for reversing the court of appeals, acts of discrimination against individuals in promotion—at least where the discriminatory act is of the type dealt with under the disparate impact doctrine—are to be countenanced if an appropriate racial balance among those promoted is nevertheless achieved.

Such a balance may result when the numerical effects of the discriminatory conduct are offset not by employer action directed toward achieving such an offset but by the coincidences of a particular promotion process. In that context, the individuals excluded by a discriminatory practice would, under the bottom-line theory, lose their claims because a sufficient number of others of their race happened, by random fortune, to have been promoted.

Such a balance may also result—as is apparently the situation here and therefore the one we focus on—where racial balance is the employer's desired end, and it is achieved by disparate treatment victimizing whites. In that context, the bottom-line theory posits that acts having a disparate impact on individuals in one racial group are to be tolerated under Title VII if they are offset by acts of disparate treatment in favor of different individuals of that racial group and against individuals of another racial group.

Thus, in this case, the theory would mean that individual blacks victimized by a discriminatory test must go without a remedy because *other* blacks, not so victimized, were given a promotion as a result of discrimination against whites.[2] The theory thus reduces in this setting to the proposition that two wrongs make a right; a statute designed to prohibit and remedy discrimination against in-

[2] The employer in this case is a governmental agency. Consequently, any racial discrimination against whites would raise constitutional as well as statutory questions. See *Minnick v. California Department of Corrections*, —— U.S. ——, 49 L.W. 4609, 4611-4613; *Steelworkers v. Weber*, 443 U.S. 193.

dividuals, not to achieve racial balance, is turned into a statute that tolerates multiple acts of discrimination as long as the result is a racial balance.

3. This Court has on several occasions rejected the bottom-line theory as a defense to claims by victims of disparate treatment. In *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579, the Court addressed the relevance of the racial balance of an employer's work force to a claim by individuals that they had been refused hire because of their race:

> A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination. * * * It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force. See *Griggs v. Duke Power Co.*, 401 U.S., at 430; *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279 (1976).[3]

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[3] The Court in *Furnco* went on to rule that proof of a racially balanced work force could be relevant only to the issue of *intent*:

> Proof that his work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided. We cannot say that such proof would have absolutely no probative value in determining whether the otherwise unexplained rejection of the minority applicants was discriminatorily motivated. Thus, although we agree with the Court of Appeals that in this case such proof neither was nor could have been sufficient to *conclusively* demonstrate that Furnco's actions were not discriminatorily motivated, the District Court was entitled to *consider* the racial mix of the work force when trying to make the determination as to motivation. [438 U.S. at 580.]

See also *infra*, n. 5, pp. 12-13.

Similarly, in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280-281, n. 8, the Court rejected the following claim made by the employer:

> Santa Fe, while conceding that "across-the-board discrimination in favor of minorities could never be condoned consistent with Title VII," contends nevertheless that "such discrimination . . . in isolated cases which cannot reasonably be said to burden whites as a class unduly," such as is alleged here, "may be acceptable." * * * We cannot agree. There is no exception in the terms of the Act for isolated cases; on the contrary, "Title VII tolerates no racial discrimination, subtle or otherwise."

And, in *Phillips v. Martin Marietta*, 400 U.S. 542, 543, the Court reversed a finding of summary judgment for the employer in a disparate treatment case, even though "at the time [the plaintiff] applied, 70-75% of the applicants for the position she sought were women [and] 75-80% of those hired for the position * * * were women * * *."

4. The proponents of the bottom-line theory urge that the result should be different when the individual's claim of discrimination concerns a *disparate impact* violation, rather than a disparate treatment violation. The analytic error that underlies this attempted distinction is the implicit assumption that the prohibition against disparate impact serves a different statutory purpose from that served by the prohibition against disparate treatment. Those who advocate the bottom-line theory proceed as if disparate impact analysis is a means for achieving appropriate racial balances, rather than a means to prohibit and to remedy a particular type of discrimination against individuals. On that premise, they justify focusing solely on the bottom-line numbers that result from a series of promotion decisions and ignoring the complex process that led to those numbers and to the effects that the process had on the individuals involved.

On this view, the disparate impact doctrine is at war with the basic approach of the statute. See *supra*, pp.

4-5. But disparate impact analysis is not simply a numbers game; as *Griggs v. Duke Power Co.*, *supra*, and its progeny show, it is designed to address a particular and subtle form of employment discrimination.

In *Griggs*, this Court explained the rationale of disparate impact analysis. At issue in that case were written aptitude tests and a high school diploma requirement that the employer used as prerequisites to certain jobs. These requirements seemed "neutral on their face," but the record showed that " 'whites register far better on [these] requirements' than Negroes." 401 U.S. at 430. The Court found that "consequence * * * to be directly traceable to race. * * * Because they are Negroes, petitioners have long received inferior education in segregated schools * * *." *Ibid.* The Court also found that "neither the high school completion requirement nor the general intelligence test [had been] shown to bear a demonstrable relationship to successful performance of the jobs for which it was used." *Id.* at 431. Within these parameters, the Court defined the nature of the violation:

> [T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. [*Id.* at 430-431.]
>
> * * *

Following *Griggs*, this Court has repeatedly refused invitations to extend the disparate impact doctrine beyond its rationale. Thus, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805-806, the Court, in disapproving a lower court's application of the *Griggs* analysis to rejection of an employment application of an individual who had

participated in unlawful conduct directed against the prospective employer, described the rationale of that analysis in the following way:

> The court below appeared to rely upon *Griggs v. Duke Power Co.*, *supra*, in which the Court stated: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S., at 431. But *Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. [Footnote omitted.]

In *Manhart*, 435 U.S. at 710-711 n. 20, the Court rejected the contention that the result the Court found required by Title VII—adoption of a gender-neutral pension plan—

> would itself violate Title VII because of its disproportionately heavy impact on male employees. Cf. *Grigg v. Duke Power Co.*, 401 U.S. 424. * * * [U]nder Title VII * * * the male employees would not prevail. Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences.

Similarly, in *Furnco*, 438 U.S. 575, and n. 7, the Court ruled that a challenge to an employer's hiring process—which involved "not accept[ing] applications at the jobsite, but instead hir[ing] only persons whom [the job superintendent] knew to be experienced and competent in [relining blast furnaces] or persons who had been rec-

ommended to him as similarly skilled" (*id.* at 570)—was properly addressed under the disparate treatment, and not the disparate impact, analysis.

While this Court has not yet drawn the precise boundaries of the disparate impact analysis, certain limits are clear. The analysis is meant to address the class of employment practices, that, while not designed or adopted in order to discriminate on the basis of race, are predicated on factors that are "artificial, arbitrary, and unnecessary" and that, because they are "traceable to race" and therefore "beyond [the] control" of the disadvantaged individuals, necessarily differentiate along racial lines. *Griggs*, 401 U.S. at 430-431; *McDonnell Douglas Corp. v. Green*, 411 U.S. at 806. Prohibiting this form of discrimination, not mandating racial balance, is the object of the disparate impact analysis.[4] Disparate impact analysis is not meant to address the myriad of other employment practices that may result in a numerical or proportional disparity between the races in an employer's workforce, but that are not predicated on the factors set out in *Griggs* and its progeny.

The bottom-line theory looses the concept of disparate impact from its rationale. Rather than focusing on particular practices to determine whether they fit the rationale of *Griggs*, the bottom-line theory focuses on the ultimate result of what may be a number of discrete practices, and the issue becomes purely one of numbers, abstracted from causes or reasons. If the numbers are in balance—*i.e.*, the races are in their "appropriate" proportions—the plaintiffs lose, regardless of the practices that may have led to that result. The end result of the

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[4] For another example of factors "beyond [the] control" of the disadvantaged individuals and "traceable to race [or sex]" that this Court has recognized are suitable for the *Griggs* analysis, see *Dothard v. Rawlinson*, 433 U.S. 321 (height requirements and weight requirements in a sex discrimination case).

bottom-line theory is to accomplish precisely what § 703 (j) was meant to preclude: the individual is ignored in favor of the goal of racial balance.

The black plaintiffs in this case have shown that the test that caused them to be excluded from consideration for a promotion had the *same* discriminatory character as the tests in *Griggs*. They are no less victims of discrimination than the plaintiffs in *Griggs*. And while the State implies that victims of disparate impact discrimination should be distinguished from victims of disparate treatment discrimination, we cannot fathom the basis for that distinction and no such basis appears in the Act or in this Court's Title VII decisions. Title VII requires a remedy for the individual victims of disparate impact discrimination as well as for the individual victims of disparate treatment discrimination. To repeat the words of *Furnco*, "A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." See *supra*, p. 7.[5]

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[5] That the bottom-line is not the proper place to focus in a disparate impact case is confirmed by the fact that a racial *disproportion* in the bottom-line numbers in a case such as this could not constitute proof of a disparate impact violation. It is important in understanding why this is so to distinguish the role that bottom-line numbers play in a *disparate treatment case* from the role those numbers play in a *disparate impact case*. In certain circumstances, depending on the nature and complexity of the employment process, a significant racial disparity in the bottom-line numbers may fairly lead to an inference of intentional discrimination and thus constitute an important part of a prima facie case of a disparate treatment violation. See, *e.g.*, *Teamsters v. United States*, 431 U.S. 324. In *Teamsters*, the Court rejected an argument that to look at overall statistics in that context would conflict with § 703(j):

> The argument fails in this case because the statistical evidence was not offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially

> balanced. Statistics showing racial or ethnic imbalance are *probative* in a case such as this one *only because* such imbalance is often *a telltale sign of purposeful discrimination*; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of *longlasting and gross disparity* between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population. [431 U.S. at 339-340, n. 20; emphasis added.]

Implicit in § 703(j)'s ban on requiring racial balance and in the reasoning of the quoted passage is the proposition that § 703(j) *does* bar reliance on racial disproportions in the bottom-line numbers in non-intent cases. For if a showing of racial disproportion in the bottom line without more is sufficient to prove a violation, the very purpose of § 703(j) would be defeated.

Moreover, where the bottom-line numbers are the sum of the effects of a *variety* of *intermediate practices*, the fact that those numbers reveal a racial disproportion would not prove a violation with respect to any particular practice. The bottom-line result might merely show the aggregate effects of a number of practices each of which on its own is entirely proper. Even if that is not so, there would from the final numbers be no way of knowing whether any particular practice had a differential impact on the races and, if so, whether that practice has the qualities that would bring it within the rationale of *Griggs*. Indeed, there would be no way of knowing whether the bottom-line disparity resulted, not from a facially race-neutral practice, but from acts of intentional discrimination. This is because all acts and practices that may have led to the bottom-line result would be lumped together, regardless of the nature of those acts and practices. Practices that might be challenged as disparate impact violations and those that might be challenged as disparate treatment violations would not be isolated and treated in accordance with the distinct criteria for assessing each type of challenge. Compare *Dothard v. Rawlinson*, 433 U.S. at 329, with *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802-803. The end result would be a case constituted by numbers that do not establish discrimination and have no significance apart from the issue of racial balance. That is what § 703(j) forbids.

CONCLUSION

For the above-stated reasons, the judgment of the Second Circuit should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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Petitioners,

v.

WINNIE TEAL *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION IN SUPPORT OF THE PETITIONERS

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---

BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council (EEAC) and the International Personnel Management Association (IPMA), with the written consent of the parties,[1] respectfully submit this brief as Amici Curiae in support of the Petitioners.

INTEREST OF THE AMICI CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad

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[1] Their consents have been filed with the Clerk of the Court.

segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially, all of EEAC's members, or their constituents are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, *as amended by* the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e (Title VII). Like the Petitioners herein, EEAC's members use tests and other selection devices and criteria to hire and promote employees. As such, they have a direct interest in the issue presented for the Court's consideration; that is, whether a prima facie case of discrimination can be established by the adverse impact of a facially neutral component of a selection process when the overall hiring or promotion rate of the plaintiff's class does not demonstrate adverse impact against that class.[2]

IPMA is an organization representing more than 1,000 public sector agencies including civil service commissions, merit system boards and personnel departments at the federal, state and local levels of government. The Association represents over 55,000 individuals, primarily personnel professionals and personnel administrators in the public sector. IPMA attempts to foster and develop in-

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[2] Because of this interest in issues involving the standard of proof in Title VII cases, EEAC has filed briefs amicus curiae in this Court in *Intl. Bro. of Teamsters v. United States*, 431 U.S. 324 (1977); *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); and *Texas Department of Community Affairs v. Burdine*, 101 Sup. Ct. 1089 (1981).

terest in sound personnel administration by providing a focus and forum for personnel professionals throughout the United States and abroad.

IPMA recognizes its special responsibility to promote and encourage affirmative action programs and to ensure that the organization itself becomes a model of equal opportunity throughout the nation both by policy and preference. The Association is committed to equal employment opportunity and continues to promote and encourage equal opportunity at all levels of government and within its Association activities. IPMA was involved in the negotiation process which resulted in the promulgation of the Uniform Guidelines on Employee Selection Procedures and the Association strongly endorsed throughout the negotiations, the inclusion of the "bottom line" concept as a mechanism which would assist employers in achieving affirmative action.

In meeting the equal employment mandate of Title VII, both private and public sector employers utilize a variety of facially neutral selection procedures including application forms, biodata, tests, performance appraisals, and assessment centers, and minimum selection criteria such as specific educational requirements. These procedures may be used separately, as the sole selection procedure, or in combination. Depending on such factors as the employer's economic resources and the size of the qualified labor pool it needs to select from, all candidates may participate through the entire selection process or certain components may serve as legitimate hurdles that identify those qualified candidates who may continue to participate in the selection process. The decision of the Second Circuit, holding that a prima facie case of discrimination may be established by the results of a component of a selection procedure which screens employees from further participation in the selection process, places employers in the position of facing potential liability to minority employees even though the overall selection process does not result in disparate impact.

STATEMENT OF THE CASE

Petitioners utilized a multi-component, merit selection process to assess the qualifications of candidates for promotion to supervisor positions in the Department of Income Maintenance. Candidates for these positions were first required to take a professionally-developed, validated test. Those employees receiving a passing score were then evaluated on the basis of past work performance, supervisors' recommendations, and seniority in conjunction with their test scores. At the third stage of the process, the Petitioners made their selections among the remaining qualified candidates.

In December 1978, the test was administered to 329 candidates for 46 vacancies. The mean score on the examination was 70.4 percent, but black candidates had a mean score that was 6.7 percentage points lower than white candidates. Because a cutoff score of 70 would have substantially limited the number of qualified blacks proceeding to the next step of the selection process, the Petitioners lowered the cutoff score to 65. Although the lower cutoff score permitted more blacks to participate in the remainder of the selection process, the percentage of blacks who continued was 54.2% compared to 79.53% of the initial white candidates. Of the 329 candidates who took the test, 246, or 74.8% of all candidates, were rated and ranked by the remaining components of the selection process. But when the selection decisions or promotions were made after application of the other components of the selection process, there was no adverse impact against blacks. Indeed, blacks were substantially favored by the Petitioners' selection process—23 percent of the blacks who initially entered the selection process were promoted, compared to 13.5% of the initial white candidates.

A suit under Title VII and other statutes was brought by four black applicants who scored less than 65 percent on the examination prior to any selection decisions being

made by the Petitioners, alleging, *inter alia*, that the test component had an adverse impact on blacks. One year after the suit was initiated, the promotion decisions were made. Relying principally on the reasoning of *Brown v. New Haven Civil Service Bd.*, 474 F. Supp. 1256 (D. Conn. 1979)—a case factually similar to the instant matter—the district court adopted the bottom line approach of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607 *et seq.* (Uniform Guidelines), and dismissed the Respondents' suit because the results of the promotion process did not have adverse impact against blacks.

The Second Circuit reversed. It held that where a component of a selection process has a disparate impact on minorities and constitutes a barrier beyond which complainant minorities cannot proceed, a prima facie case of discrimination is established even though the process taken as a whole does not result in disparate impact. Distinguishing the situation where all candidates participate in the entire selection process and the overall results have no adverse impact on minorities, the court of appeals disagreed with the district court's holding in *New Haven Civil Service Bd.*

SUMMARY OF ARGUMENT

Congress did not intend in enacting Title VII that courts should examine the components of a facially neutral selection process, or collaterally that complainants could establish prima facie cases of discrimination based on the results of one segment of a selection procedure, if the final hiring and promotion decisions do not evidence adverse impact. Indeed, this Court has recognized that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* [*v. Duke Power Co.*, 401 U.S. 424 (1971)] does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *City of Los Angeles v. Manhart*, 435 U.S. 702, 710 n.20 (1978) (emphasis in original). Absent evidence of dis-

criminatory intent, this Court and the federal enforcement agencies have looked at the "bottom line", *i.e.*, the overall results of the selection process to assess whether plaintiffs have established prima facie cases of discrimination. *See Dothard v. Rawlinson*, 433 U.S. 421 (1977); *Intl. Bro. of Teamsters v. United States*, 431 U.S. 324 (1977); and Uniform Guidelines, 29 C.F.R. § 1607.4C.

The Second Circuit's decision misapplies the bottom line standard, in part, because of its failure to recognize that the pattern of proof in disparate impact cases is addressed to the evidence of the adverse consequences that a facially neutral practice has on the plaintiff's group rather than the plaintiff directly, as under a disparate treatment theory of discrimination, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Moreover, in adopting a standard that requires greater judicial scrutiny of a selection process that does not permit all qualified candidates to participate in all steps of the process than a process that does, the lower court violated the Court's admonition in *Furnco Construction Co. v. Waters*, 438 U.S. 567, 578 (1978), that employers are not required to adopt a "best" hiring procedure that would permit it "to at least consider . . . the most minority employees." Furthermore, application of the Second Circuit's standard of proof would have deleterious effects on judicial economy and efficiency, because examination of each component or sub-component of a selection process that has adverse impact "launches a court on a course that has no boundaries and no clear end." *New Haven Civil Service Bd.*, 474 F. Supp. at 1261.

This Court and the federal enforcement agencies have stressed that voluntary compliance is the "preferred means" of eliminating employment discrimination. *Alexander Gardner-Denver*, 415 U.S. 36, 44 (1974); Affirmative Action Guidelines, 29 C.F.R. § 1608.4. Thus, once the Petitioners had established an eligibility pool of qualified candidates, it was not impermissible under Title VII for the Petitioners to assure that among those se-

lected there was adequate representation of black supervisors in its workforce because "the employer has discretion to choose among equally qualified candidates." *Texas Department of Community Affairs v. Burdine*, 101 Sup. Ct. 1089, 1097 (1981).

ARGUMENT

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE PURPOSES OF TITLE VII, PRIOR PRECEDENT OF THIS COURT, AND WITH THE BOTTOM LINE APPROACH WHICH THIS AND OTHER COURTS AND THE FEDERAL ENFORCEMENT AGENCIES HAVE ADOPTED IN DISPARATE IMPACT CASES.

A. A Prima Facie Case of Disparate Impact Under Title VII Cannot be Established By The Results of a Component of a Selection Process If There is No Adverse Impact in the Number of Minorities Hired or Promoted.

In enacting Title VII, Congress sought to improve the employment opportunities of minorities and women by assuring that selection decisions were made in a nondiscriminatory manner.[3] "Accordingly, it was clear to Congress that 'the crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them.' [110 Cong. Rec.] at 6548 (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against

[3] When Congress amended Title VII in 1972 extending its nondiscriminatory requirements to state and local jurisdictions, "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard v. Rawlinson*, 433 U.S. 321, 331, n. 14 (1977). *See* H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 17 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 10 (1971). *See also Washington v. Davis*, 426 U.S. 229 (1976). Accordingly, this brief treats the equal employment requirements of Title VII as being identical for the public and private sector.

racial discrimination in employment was primarily addressed." *United Steelworkers v. Weber*, 99 Sup. Ct. 2721, 2728 (1979). The focus of Title VII, therefore, is on whether an employer's practices result in hiring, promotion, or other employment discrimination against minorities and women.

As demonstrated below, the Congressional concern was with the overall result of the hiring or promotion process. Congress did not intend that courts examine the components of facially neutral selection processes, or collaterally that complainants could establish prima facie cases of discrimination based on the results of one segment of a process, if the final hiring and selection decisions do not evidence adverse impact. All that has been "required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In this case, the results of the Petitioners' neutral selection process confirm that its selection process does not act as a discriminatory barrier to minority candidates as a group. Indeed, this is *not* a case which "racial discrimination was the [employer's] standard operating procedure—the regular rather than the unusual practice." *Intl. Bro. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). *See also Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772 (1976).

Moreover, although Title VII does not require employers to hire or promote minorities and women in proportion to their representation in the population (see 42 U.S.C. § 2000e-2(j)), this Court has held that the ordinary expectation is that "nondiscriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population of the community from which employees

are hired." *Teamsters*, 431 U.S. at 340 n. 20.[4] By the same reasoning, where the employer's overall promotion procedure results in a minority promotion rate that is greater than would be expected by their labor force representation, or representation in the relevant labor pool, the lack of discrimination should be presumed.

In implementing the nondiscrimination requirements of Title VII, this Court has adopted two patterns of proof of discrimination—disparate treatment and disparate impact. *Teamsters*, 431 U.S. at 335 n. 15. Under these practical proof schemes, the focus of the Court's inquiry has been on the reasons for nonselection in a disparate treatment case (*see McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973)) and on the consequences of the total selection process in a disparate impact case (*see Griggs*, 401 U.S. at 432 (1971), and *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977)).[5] Under the disparate impact standard, misapplied by the court below, it is the outcome of the entire selection process that determines whether a prima facie case under Title VII has been established.

This is the first case in which this Court has been asked to find discrimination in a selection process whose

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[4] *See also Hazelwood School District v. United States*, 433 U.S. 229, 307-08 (1977) ("Where gross disparities can be shown, they alone in a proper case constitute prima facie proof of a pattern and practice of discrimination."); and *New York City Transit Authority v. Beazer*, 440 U.S. 568, 584 n. 25 (Plaintiffs would be hard pressed to present a discriminatory purpose case because the defendant employed minorities at twice their availability in the relevant labor market).

[5] There is no justification in the context of this case for examination of a component of a selection process on the basis of a disparate treatment theory, absent direct evidence that the component was intended to screen out blacks or the Respondents themselves. Indeed, the trial court specifically found that "proof of such intent is absent in this case and plaintiffs' § 1983 equal protection claim accordingly must fail." Pet for Cert. 24a. The overall results of the selection process establish that the Petitioners did not intend to screen out blacks as a class.

overall result favors minorities. The Court's prior decisions have indicated, however, that it is the overall results of the selection process that determine whether a prima facie case under Title VII has been established. Thus, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court stated that the complainant party or class makes out a prima facie case, if it has been "shown that the tests in question *select applicants for hire or promotion* in a racial pattern significantly different from that of the pool of applicants." 422 U.S. at 425 (emphasis added). Again, in *Dothard v. Rawlinson*, 433 U.S. 421 (1977), the Court assessed the results of the overall selection process and stated that, under *Griggs* and *Albemarle*, it was clear that a prima facie case could be established by a plaintiff's showing that facially neutral selection standards "*select applicants for hire* in a significantly discriminatory pattern". 433 U.S. at 329 (emphasis added). Importantly, it was only *after* it had been shown that the multi-component "employment standards" in *Dothard* were discriminatory in overall effect that this Court held the employer was required to meet the burden of showing that a specific selection requirement was job related. *Id.*

In *Dothard*, as in *Griggs* and *Albemarle*, it was evident that the overall selection process had a substantial adverse impact on the plaintiffs' protected group. Nothing in these three decisions suggests that a procedure that ultimately selects minorities or women at a rate equal to or greater than their representation in the eligibility pool may nevertheless be discriminatory. Read together, these cases support a "bottom line" standard, and are consistent with the administrative interpretations of the federal enforcement agencies, discussed below, and represent a practical and workable scheme for establishing prima facie cases of discrimination. By contrast, the Second Circuit's decision is inconsistent with the purposes of Title VII, the precedent of this Court, and the guidance of the federal enforcement agencies. Accordingly, the Second Circuit's decision should be overturned.

B. The Second Circuit's Decision is Not in Conformance With the Bottom Line Approach Which the Federal Enforcement Agencies Have Adopted to Determine Liability Under Title VII.

The bottom line approach to assessing the employment practices of employers has been endorsed by the federal enforcement agencies. In the first federal guidelines on employment testing to follow the Supreme Court's decision in *Griggs*, the Department of Justice, Department of Labor, and the Civil Service Commission, now the Office of Personnel Management, adopted the Federal Executive Agency (FEA) Guidelines on Employee Selection Procedures, 41 C.F.R. Part 60-3 (1977), which in their view were "more consistent with the Supreme Court and the authoritative decisions of the other appellate courts, than any set of existing guidelines." 41 Fed. Reg. 51374 (November 23, 1976). Specifically addressing the underlying question of law, Section 4(b) adopted a bottom line approach to adverse impact determinations:

> (b) The information called for by this section should be examined for possible adverse impact. *If* the records called for by this section indicate that *the total selection process* for a job *has no adverse impact, the individual components of the selection process need not be evaluated separately for adverse impact.* If a total selection process does have adverse impact, the individual components of the selection process should be evaluated for adverse impact.

41 C.F.R. § 60-3.4b (emphasis added). The Equal Employment Opportunity Commission (EEOC) did not join the three other federal agencies in their 1976 guidelines. Rather, EEOC republished its 1970 Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607 *et seq.* (1977), which were focused on test validation and did not address the bottom line issue.

Subsequently, in 1978, the four agencies were able to agree on a uniform federal position on selection practices in the Uniform Guidelines on Employee Selection

Procedures (Uniform Guidelines), 43 Fed. Reg. 38290 (August 25, 1973). Their position reflecting the bottom line, however, obviously represented a substantial compromise between the FEA Guidelines' unequivocal interpretation of Title VII as incorporating a bottom line concept and the position of the EEOC. Indeed, so significant was the disagreement that the preamble to the Uniform Guidelines states that "these guidelines do not address the underlying question of law" with respect to the bottom line standard. 43 Fed. Reg. at 3829. The 1978 guidelines, however, did not explain why the 1976 FEA bottom line approach no longer was valid. Thus, the 1976 FEA Guidelines stand as the enforcement agencies' sole and definitive statement of the underlying question of law.

Notwithstanding the qualifications found in the 1978 Guidelines, as discussed below, Section 4C of the Uniform Guidelines reinforces and supports the bottom line approach of this Court and that of the 1976 FEA Guidelines. Section 4C provides that:

> C. *Evaluation of selection rates. The "bottom line."* If the information called for by sections 4A and B above shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. *If* this information shows that *the total selection process does not have an adverse impact, the Federal enforcement agencies,* in the exercise of their administrative and prosecutorial discretion, *in usual circumstances,* will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and *will not take enforcement action based upon adverse impact of any component of that process including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection.* However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the indi-

> vidual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in (1) and (2) above, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

29 C.F.R. § 1607.4C. Accordingly, even under its own terms the 1978 Guidelines recognize the validity of the bottom line approach except where *prior* discriminatory practices are perpetuated by the current selection process, or where the weight of court authority holds that a particular procedure is not job related. Neither exception applies to this case or to the usual case involving neutral selection practices. Moreover, as discussed below, even these two limited qualifications to the bottom line approach lack a sufficient legal basis.

That adverse impact and the bottom line are determined under Title VII and the Uniform Guidelines on the basis of selection rates and the total selection process, moreover, is supported by the Guidelines' definitions and several published questions and answers (Q & A) adopted by the enforcement agencies to clarify the meaning of the Guidelines.[6] 43 Fed. Reg. 11996 (March 2, 1979). For

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[6] The Questions and Answers were issued by the enforcement agencies subsequent to the issuance of the Uniform Guidelines to clarify their meaning. Unlike the Guidelines, they were not subject to public comment before their issuance in accordance with the rulemaking procedures of the Administrative Procedures Act, 5 U.S.C. § 553. Accordingly, while helpful in the context of this case in clarifying the ambiguous language in the Guidelines relating to

example, adverse impact is defined as "a substantially *different rate of selection* in hiring, promotion or other employment decisions." 29 C.F.R. § 1607.16B; Q & A 10, 43 Fed. Reg. at 11998. Similarly, the adverse impact determination is based on the "rate of selection." (Q & A 12, *id.*) which is defined as "[t]he proportion of applicants or candidates who are hired, promoted, or otherwise selected." 29 C.F.R. § 1607.16R.

The two limited exceptions to the bottom-line approach of the Uniform Guidelines found in Section 4C, moreover, should not be viewed by the Court as undercutting the standard. Indeed, logic and precedent of this Court highlight the lack of any valid basis for these narrow exceptions. First, the exception for components that continue a pattern of assignment based on prior discriminatory practices does not relate in any meaningful way to the bottom line effect of current selection procedures. If the effect of current selection procedures is to perpetuate discriminatory assignment patterns, those procedures would undoubtedly have an adverse impact. On the other hand, if the bottom line selection rate shows no adverse impact, the total process itself cannot perpetuate past discrimination. This exception, moreover, is inconsistent with *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977), in which the Court held that actions predating the timely filing of a Title VII charge are not unlawful and their later effects may not constitute a Title VII violation. *See also Hazelwood*, 433 U.S. at 309 ("[S]tatistical proof in the record might at the trial court level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII").

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adverse impact and the bottom line, the Court should not accord them a legal status equivalent to the Guidelines.

Moreover, in other respects the Guidelines themselves are not consistent with Title VII and, accordingly, they should not be considered by the Court as having the "force and effect" of law. *See Albemarle*, 422 U.S. at 452 (Burger, C.J., concurring and dissenting in part). Thus, the Amici do not endorse the Guidelines except as indicated.

The basis for the second exception to the bottom line—for specific procedures which have been found not to be related in the same or similar circumstances—is equally questionable. The exception clearly bears no relationship to the overall results of selection process for if the overall process has no adverse impact, there is no basis for administrative or judicial inspection of a component of a selection procedure. Significantly, Justice Rehnquist in his concurring opinion in *Dothard* highlighted the inappropriateness of generalizing as to the validity of a component of a selection decision based on court or administrative decisions:

> While I also agree with the Court's conclusion in Part II of its opinion, holding that the District Court was "not in error" in holding the statutory height and weight requirements in this case to be invalidated by Title VII, *ante*, at 332, the issues with which that Part deals are bound to arise so frequently that I feel obliged to separately state the reasons for my agreement with its results. *I view affirmance of the District Court in this respect as essentially dictated by the peculiarly limited factual and legal justifications offered below by appellants on behalf of the statutory requirements.* For that reason, I do not believe—and do not read the Court's opinion as holding—that all or even many of the height and weight requirements imposed by States on applicants for a multiude of law enforcement agency jobs are pretermitted by today's decision.

Dothard, 433 U.S. at 377 (emphasis added) (concurring opinion Justice Rehnquist with whom the Chief Justice and Justice Blackmun join).[7]

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[7] The justification for Justice Rehnquist's concern that the *Dothard* holding would be expanded to a general rule is reflected by the discussion of the enforcement agencies in Q & A 25 of the circumstances when components of a selection procedure should be evaluated. There, in illustrating the second exception to the bottom line, they state:

> Similarly, a minimum height requirement disproportionately disqualifies women and some national origin groups, and has

Thus, in view of the legal insufficiency of the two narrow exceptions found in section 4C to the bottom line standard and the fact that the Guidelines do not address the underlying question of law, the Uniform Guidelines in any event support the view that a prima facie case of disparate impact is established on the basis of selection rates and the total selection process. Accordingly, the results of the total selection process are the proper basis for establishing a prima facie case of disparate impact. As has been well-stated by the Third Circuit Court of Appeals:

> We hold, therefore, that no violation of Title VII can be grounded on the disparate impact theory without proof that the questioned policy or practice has had a disproportionate impact on the employer's workforce. This conclusion should be as obvious as it is tautological: there can be no disparate impact unless there is disparate impact.

EEOC v. Greyhound Lines, 635 F.2d 188, 192 (3d. Cir. 1980).

C. The Second Circuit's Decision Misapplies the Bottom Line Test by Inappropriately Making Distinctions Between Successive Hurdle and Cumulatively Scored Selection Processes and Fails to Recognize the Adverse Consequences of its Decision on Judicial Economy and Efficiency.

In its decision, the Second Circuit distinguished between selection processes that permit candidates to participate in all steps of the selection process (cumulatively scored processes) and those which preclude further participation of the candidate who does not meet a specified requirement or cutoff score (multiple or successive hurdle processes). With regard to the former, the appellate

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been held not to be job related in a number of cases. For example, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Court held that height and weight requirements not shown to be job related were violative of Title VII. Thus an employer using a minimum height requirement should have evidence of its validity.

43 Fed. Reg. at 12000.

court concluded in agreement with numerous courts that a bottom line approach was appropriate.[8] It held that if "the overall results [of a cumulatively scored selection process] reveal no significant disparity of impact, scrutinizing individual questions or individual sub-tests would "conflict [] with the dictates of common sense." Pet. for Cert. 12a (citation omitted). With regard to multiple hurdle processes, however, the Second Circuit held, against the great weight of authority,[9] that if a component disproportionately acts as a barrier to blacks' further participation in the selection process it denies those blacks equal opportunity. Pet. for Cert 12a.

The Second Circuit's decision is based in part on its conclusion that to hold otherwise would mean that "Congress intended to protect faceless groups rather than individuals." Pet. for Cert. 12a. It reached this conclusion, in part, because it incorrectly understood how individual rights are protected in disparate impact cases. Justice Marshall (joined by Justice Brennan) in his concurring and dissenting opinion in *Furnco Construction Co. v. Waters*, 438 U.S. 567, 582 (1978), has clarified that "[a]n individual may allege that he has been sub-

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[8] *See, e.g., Smith v. Tyron*, 520 F.2d 492, 497-98 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976); *Rule v. Ironworkers Local 396*, 568 F.2d 558, 565 n. 10 (8th Cir. 1977); *Williams v. City & Cty. of San Francisco*, 483 F. Supp. 335, 340 (N.D. Calif. 1979); and *Lee v. City of Richmond*, 456 F. Supp. 756, 771 (E.D. Va. 1978).

[9] *See, e.g., EEOC v. Navajo Refining Co.*, 593 F.2d 988 (10th Cir. 1979); *Brown v. New Haven Civil Service Board*, 474 F. Supp. 1256, 1261-63 (D. Conn. 1979); and *Stewart v. Hannon*, 469 F. Supp. 1142 (N.D. Ill. 1979). *Cf. Kirkland v. New York State Department of Correctional Services*, 374 F. Supp. 1361, 1370 (S.D. N.Y. 1974), *aff'd in relevant part*, 520 F.2d 420, 425 (2d Cir. 1975) (showing that an overall examination procedure having disparate results cannot be rebutted by fragmenting the process and showing no disparate results in separate parts); and *Vulcan Society of New York City Fire Department v. Civil Service Commission*, 360 F. Supp. 1265, 1272 (S.D. N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973) (same). *Contra, League of United Latin American Citizens v. City of Santa Ana*, 410 F. Supp. 873, 894-95 (C.D. Calif. 1976).

jected to 'disparate treatment' because of his race or that he has been the victim of a facially neutral practice having a 'disparate impact' on his racial *group*." (Emphasis added.) Where facially neutral selection decisions have an adverse effect on a particular group, and cannot be justified by business necessity or otherwise validated, individual relief may be obtained. *Dothard*, 433 U.S. at 329. Here, the overall selection process had no adverse impact on blacks as a group and there is, therefore, no basis for relief for individual blacks.

The Second Circuit also concluded that a bottom line standard for successive hurdle selection processes was inappropriate because both the discriminatory component and affected individuals are readily identifiable. In contrast, it believed that cumulatively scored selection processes were inherently fairer and, accordingly, that the bottom line test should apply. Pet. for Cert. 12a.

Second Circuit Judge Newman sitting by designation in *Brown v. New Haven Civil Service Board*, 474 F. Supp. 1256 (D. Conn. 1979), has perceptively discussed the underlying fallacies and problems inherent in the Second Circuit's distinction between the two kinds of selection processes and the adverse consequences that judicial scrutiny of the selection components of selection processes would have on judicial economy and efficiency. In *New Haven Civil Service Board*, Judge Newman stated:

> The plaintiffs distinguish *Smith v. Troyan supra*, by pointing out that the written exam there was part of a cumulative application process. The written exam here, by contrast, combined with the physical exam, was a pass-fail hurdle that could prevent an applicant from entering the pool from which hiring decisions were made on the basis of interviews. *Cf. League of United Latin American Citizens v. City of Santa Ana, supra*, 410 F.Supp. at 894. But this distinction has no effect on the analysis of the problem presented. Even in a cumulatively scored application process, a score on any single component might

be so low as to preclude the accumulation of a total score meeting a minimum hiring requirement, *cf. United States v. City of Buffalo*, 457 F. Supp. 612, 622 (W.D.N.Y. 1978), or a total score at least equal to that of the lowest scoring applicant who was hired. The fact that test scores are cumulated in an application process would not itself prevent scrutiny of a component, if that type of investigation were legally required.

To examine each component of an entire application process, however, launches a court on a course that has no boundaries and no clear end. In *Smith v. Troyan*, *supra*, unsuccessful applicants to the East Cleveland police force challenged a "subtest" in the process of hiring. The court recognized that the same type of challenge could be made of any subtest segment of a subtest, and that at its extreme that theory of Title VII "would require the elimination of individual questions marked by poorer performance by a racial group . . . ." 520 F.2d at 498.

Presumably, even courts that have penetrated an application process to examine a component of it would draw the line at some point, to avoid scrutiny of every question of every test in a hiring procedure. Such particularized judicial review would create obvious problems of court management and administration. Moreover, a test used in evaluating applicants might be found valid despite the disproportionate effect on a minority group of a single question that was not job-related. *Cf. Firefighters Institute for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514 (8th Cir. 1977). Yet even if only one question has a disproportionate impact on a minority group, an individual who answers that question incorrectly and then fails by one point to accumulate the minimum required score for hiring can argue that he has been the victim of discrimination in the hiring process. The prospect of a court's examining subtests, sub-tests, and even individual questions within test

segments argues in favor of examining only the end result of an entire hiring process.[9]

[9] Once an overall hiring process has been found to discriminate, a court may examine the process to isolate components as the particular causes for that total unlawful effect. *See Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 354 F. Supp. 778, 794 (D. Conn.), *aff'd in part*, 482 F.2d 1333 (2d Cir. 1973).

474 F. Supp. at 1262 (footnote 8 omitted).

Not only does the Second Circuit's decision launch courts "on a course that has no boundaries and no clear end" (*id.*), but examination of the components of a selection process when the overall process does not evidence adverse impact creates a problem, widely acknowledged by statistical texts, of multiple comparisons.[10] That is, if there are many opportunities for a "rare event" to occur, *i.e.*, adverse impact in some component or subcomponent of a selection process, and courts search for adverse impact in a sufficiently large universe, we should not be surprised if courts find that one component of a selection process has adverse impact when the overall process has no such impact. Indeed, this Court has recognized that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *City of Los Angeles v. Manhart*, 435 U.S. 702, 710 n. 20 (1978) (emphasis in original).

In sum, the differences drawn by the Second Circuit between the two types of selection processes do not justify application of a bottom line standard for a cumulatively scored, but not for a successive hurdle selection process. Rather, the lower court's approach of judicial scrutiny of specific components of selection processes would have an

[10] *See, e.g.*, Miller, *Simultaneous Statistical Inference* (1977); Maxwell, *Analyzing Qualitative Data* (1977); and Feinberg, *The Analysis of Cross-Classified Categorical Data* (1977).

adverse effect on the effective use of judicial resources, and, more significantly, disrupts the practical proof scheme adopted by this Court in *Albemarle* and *Dothard* for prima facie cases of disparate impact.

D. The Second Circuit's Decision Conflicts With the Principles Enunciated By This Court in *Furnco*.

As discussed above, the Second Circuit concluded that a cumulatively scored selection process which permits all applicants to participate in the entire selection process was fairer than a successive hurdle process. Furthermore, the Court held that the results of the Petitioner's selection process could not relieve them of liability for the adverse impact of the component of a selection process. Pet. for Cert. 15a. The lower court's decision, however, is in direct conflict with this Court's decision in *Furnco*.

In *Furnco*, three qualified black bricklayers applied "at the gate" for employment. They were denied employment, not because they were unqualified, but because the job superintendent "did not accept applications at the jobsite, but instead hired only persons whom he knew to be experienced and competent in this type of work or persons recommended to him as similarly skilled." 438 U.S. at 570. The trial court found, however, that although only 5.7% of the bricklayers in the relevant labor market were minority group members, 13.3% of the man-days worked at Furnco were by black bricklayers. *Id.* at 571-72. Moreover, Furnco had a self-imposed affirmative action plan to insure that black bricklayers were hired in excess of their representation in the local union. *Id.* at 572. From these findings, the district court concluded that the plaintiffs had failed to establish a prima facie case of disparate impact or treatment. *Id.* The Seventh Circuit reversed. In finding that a prima facie case of disparate treatment had been established, the appellate court "reject[ed] Furnco's argument that discrimination had not been shown because a white appearing at the jobsite would have fared no better than

[plaintiffs]." *Id.* at 573-74. The Appeals Court held that Title VII precluded an employer from refusing to consider qualified blacks. *Id.* at 574 n. 5.

This Court reversed the Seventh Circuit.[11] It disagreed with the court of appeals' view that an employer must "consider the qualifications of the largest number of minority applicants." *Id.* at 576-77. Rather, the Court held that Title VII does not require businesses to adopt the " 'best' hiring procedures" or require an employer to "pursue [] the course which would both enable [it] to achieve [its] own business goal *and* allow [it] to consider the *most* employment applications." *Id.* at 577-78 (emphasis in original). Importantly, with respect to the Seventh Circuit's conclusion that "different practices would have enabled that the employer *at least consider*, and perhaps hire, *more minority employees*," this Court concluded that "courts may not impose such a remedy on an employer until at least a violation of Title VII has been proved." *Id.* at 578.

Significantly, moreover, the Court in *Furnco* also declined to remand the case to the appellate court for further consideration on whether Furnco's facially neutral selection process resulted in disparate impact. *Id.* at 575. In doing so, it upheld the finding of the trial court, affirmed by the Seventh Circuit, that Furnco's selection process which included an affirmative action component did not violate Title VII under a disparate impact theory.

The Second Circuit's decision, however, is in direct conflict with *Furnco*. The lower court has concluded that a selection process which permits all qualified candidates to participate in every component of a selection process is inherently fairer than one that does not. Its view im-

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[11] Although the Court's decision in *Furnco* was decided on the basis of a disparate treatment theory, the principles enunciated by the court concerning the employer's obligation to consider qualified candidates and the effect of an affirmative action plan on liability are equally applicable here.

plies that selection processes that permit all applicants to proceed through all steps are somehow the "best" or "preferred" process for which a bottom line analysis is appropriate. On the other hand, it held that a selection process that contains a series of successive hurdles requires scrutiny of the component parts if one component has adverse impact. Thus, it has adopted two very different standards for establishing a prima facie case of disparate impact based on its perception of the "fairness" of the selection process. This Court expressly rejected such an approach in *Furnco* when it held that employers are not required to adopt a "best" hiring procedure that would permit it "to at least consider . . . the most minority employees." *Id.* at 578. Indeed, a unanimous Court expressly held in *Texas Department of Community Affairs v. Burdine*, 101 Sup. Ct. 1089, 1097 (1981) that Title VII "was not intended to 'diminish traditional management prerogatives' " and that an "employer has discretion to choose among equally qualified candidates." (Citation omitted.)

Accordingly, Title VII does not command that all applicants in a selection process be permitted to participate in all of its component parts. *Furnco*, 438 U.S. at 578. Indeed, as a practical matter, it is unrealistic to expect that all applicants for hire and candidates for promotion will proceed through all steps of a selection process. For example, if an employer has 100 applicants for 2 openings, the employer does not need an eligibility pool of 100 persons. Rather, through the components of its selection process it could legitimately seek to narrow the pool of qualified applicants to a manageable number from which to make its selection decision.[12] The effect of Second Circuit's decision, however, is to impermissively dis-

[12] *See Stewart v. Hannon*, 469 F. Supp. 1142, 1146 (N.D. Ill. 1979) ("It seems that the score was chosen so that, in a situation where there are more qualified candidates than openings, the Board would have the most qualified candidates (as determined by it) and the requisite size pool from which to choose").

courage the use of successive hurdle selection procedures and to prefer cumulatively scored procedures.

The Second Circuit's decision also conflicts with *Furnco* in stating that an affirmative action component of the selection process cannot insulate an employer from liability for the disparate results of another component of that selection process. By contrast, in adopting the reasoning of the district court in *Furnco*, 438 U.S. at 578, this Court indicated that the affirmative action efforts of the employer might ameliorate the disparate impact of a component of the selection process, absent evidence of a discriminatory motive with respect to the process utilized. Indeed, even with respect to the issue of motive, the Court held: "Proof that [its] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevent on the issue of intent when that issue is yet to be decided." *Id.* at 580. As shown below, an employer's voluntary policy to increase the minority selection rate furthers the policies of Title VII and is consistent with this Court's prior decisions.

E. Title VII and Decisions of This Court Permit Employers to Make Adjustments to Compensate for the Adverse Effects of Components of Selection Processes.

In the instant case, the employer offset the effects of the written component of the selection process by taking positive steps to assure that the overall selection rate would not have an adverse impact on minorities. The appellate court found these efforts irrelevant to the case because of its view that "an employer's adoption of affirmative action policies has never been held by the courts to relieve the employer of liability under Title VII to persons who were injured by the employer's previous discriminatory conduct" (Pet. for Cert. 15a), citing *Teamsters*, 431 U.S. at 341-42. As shown below, the Second Circuit's view is erroneous and undercuts the policies of Title VII which encourage *voluntary* adjustments to ameliorate the adverse effects which employment practices may have on minority employees. As this

Court has emphasized, the legal principles applicable to selection procedures must not be employed woodenly, but rather "must be viewed in the context of the [employer's] operation and the history of the testing program." *Albemarle*, 422 U.S. at 427.[13]

While affirmative action is not required by Title VII, once undertaken, it becomes relevant to an overall examination of the selection process. Thus, on the one hand, it is established, as noted above, that an employer is not *required* to establish the "best" hiring procedure that would permit it "to at least consider . . . the most minority employees." *Furnco* 438 U.S. at 578.[14] But on the other hand, in *Weber* and other cases this Court has stressed that the "primary" objective of Title VII is the removal of barriers to minorities "that have operated in the past to *favor* an identifiable group of *white* em-

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[13] The situation in *Teamsters* referred by the Second Circuit has no counterpart in the instant case. In *Teamsters*, the employer's later affirmative action efforts were found insufficient to overcome the effects of earlier purposeful discrimination directed against specific minority individuals and groups. Here, there was no showing of such discrimination. Rather, the employer voluntarily undertook an opposite policy and attempted to ameliorate the effects of a neutral test in a way that would increase rather than exclude minority workforce participation. Furthermore, the Court's decisions in *Griggs* and *Albemarle* do not support the Second Circuit's refusal to credit the employer's affirmative action efforts. In both those cases, the Court viewed the selection procedures against a history of virtually total and intentional exclusion of minorities from their workforces. *See Griggs*, 401 U.S. at 426-27, 428-31, and *Albemarle*, 422 U.S. at 409-411, and 425-430.

[14] As stated by the Court in *Burdine*:

> Title VII, however, does not demand that an employer give preferential treatment to minorities or women. 42 U.S.C. § 2000e-2(j). *See Steelworkers v. Weber*, 443 U.S. 193, 205-206. (1979). The statute was not intended to "diminish traditional management prerogatives." *Id.* at 207. It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. *Furnco Construction Co. v. Waters*, 438 U.S. at 577-578.

101 Sup. Ct. at 1097 (emphasis added).

ployees over other employees." *Griggs*, 401 U.S. 429-430 (emphasis added); *Albemarle*, 422 U.S. at 417 (1975); *and Weber*, 99 Sup. Ct. at 2727-28. It also is clear that voluntary compliance is the "preferred means" of eliminating employment discrimination (*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)), and that employers are encouraged to "self-examine and to self-evaluate their employment practices." *Teamsters*, 431 U.S. at 364; and *Weber*, 99 Sup. Ct. at 2728.

In keeping with Title VII's policy of self-examination, the federal enforcement agencies have adopted policies that encourage both voluntary compliance and the bottom line standard for selection procedures. For example, in the 1978 Uniform Guidelines, the enforcement agencies concluded that voluntary action to eliminate the adverse impact of a selection procedure is permissible under Title VII. Importantly, in terms of determining adverse impact of selection procedures those guidelines do not distinguish between cumulatively scored and successive hurdle selection processes. See Section 3A, 29 C.F.R. § 1607.3A. More significantly, however, Section 6 of the Uniform Guidelines provides that where a selection procedure has adverse impact, the employer may (1) modify a formal, scored procedure such as a test to eliminate the adverse impact or (2) eliminate the adverse impact from unscored procedures, or (3) choose alternative selection procedures as part of an affirmative action program to eliminate the adverse impact. 29 C.F.R. § 1607.6. Here, the Petitioners lowered the cutoff score of the test to increase the participation of blacks in the later steps of the process. When it became evident that that action alone would be insufficient to eliminate adverse impact from the total selection process if the Petitioners selected supervisors in proportion to the representation rate of those candidates whose test scores exceeded the cutoff score, they took further action in accordance with Section 6 to eliminate the adverse impact.[15] Thus, the four federal

[15] As discussed above, "an employer has discretion to choose among equally qualified candidates". *Burdine*, 101 Sup. Ct. at 1097.

enforcement agencies have encouraged and authorized under Title VII the very action which the Petitioners herein took.

The EEOC's Affirmative Action Guidelines, 29 C.F.R. §§ 1608 *et seq.*, also encourage voluntary action. Section 1608.4 of the Guidelines provides in relevant part that if self analysis shows that the employer's employment practices have or tend to have adverse effect, the employer may take reasonable action designed to correct the problem. Significantly, it is not necessary under the Guidelines that the self analysis establish a violation of Title VII.[16]

Employers, like the Petitioners, who analyze their workforce or applicant flow statistics and determine that there may be potential Title VII liability, may conclude that voluntary efforts are warranted so that their workforces more closely mirror the racial or sexual composition of the qualified labor force in the relevant labor market. Even if it is not certain that an employer has discriminated, a self analysis of the surrounding circumstances may lead it to conclude that corrective action should be undertaken voluntarily. *See, e.g., United Steelworkers v. Weber, supra.* Relevant considerations could include a desire to remedy the effects of past discrimina-

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[16] In addition to the voluntary equal employment mandate of Title VII, both public and private sector employers are also subject to various mandatory affirmative action requirements. Federal contractors at some 325,000 establishments are subject to the affirmative action obligations of Executive Order 11246, 30 Fed. Reg. 12319 (1965), *as amended by* 32 Fed. Reg. 14302 (1967) and 43 Fed. Reg. 46501 (1978). Unlike Title VII, the statistical imbalances that trigger these affirmative action requirements need not be connected to any showing of past or present discrimination. *See Hearings on S. 2115, etc., Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess.* 77, 88 (1971); Nash, "Affirmative Action Under Executive Order 11246," 46 N.Y.U. L. Rev. 225, 229-230 (1971). Likewise public employers, like the petitioners herein, are subject to various state affirmative action statutes. See, *e.g.*, Conn. Stat. § 46a-68.

tion, the possibility of time consuming and costly processing of discrimination complaints, the uncertainty of the outcome of litigation, and a desire to avoid wasteful and expensive litigation. As the *Weber* decision indicates, the public policy of encouraging voluntary compliance could hardly be achieved if such actions were permitted only when discrimination could be established to a certainty.

Here, the Petitioners self analysis showed that even after lowering the cutoff score—itself an affirmative step—the lower score would also result in adverse impact against blacks for the total selection process if the employer made its selections of the qualified persons in the eligibility pool in proportion to their representation therein. Thus, the Petitioners took positive steps to assure adequate representation of black supervisors in its workforce. Such action on its part was not impermissible under Title VII because "the employer has discretion to choose among equally qualified candidates," *Burdine*, 101 Sup. Ct. at 1097, as identified by the application of the components of the selection process.

In sum, the Petitioners' voluntary action was reasonable under the circumstances. It was "a temporary measure, [and] it is not intended to maintain racial balance, but simply to eliminate manifest racial imbalance." *Weber*, 99 Sup. Ct. at 2730. Moreover, it did not involve a quota or a specified number of selections from a particular a class. *See Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). The decision of the Second Circuit, however, places employers in the ironic position of being liable under Title VII even if they take voluntary action to increase the selection rate to favor the complaining party's class. Under the Second Circuit's decision, employers who have attempted successfully to evaluate and modify their employment practices still would find these attempts insufficient to prevent a finding of adverse impact caused by a component of a selection process. Such a result is inconsistent with the purposes of Title VII and the decisions of this Court.

CONCLUSION

The decision of the Second Circuit undercuts the practical proof scheme that this Court has adopted for prima facie cases of disparate impact as well as the equal employment mandate of Title VII. Accordingly, its decision should be overturned by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CONNECTICUT, *et al.*,
Petitioners,

v.

WINNIE TEAL, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

In a Title VII suit by black employees who were absolutely barred by their failure to pass a written examination from being considered for promotion to positions they had temporarily filled, did the district court, which found the examination to be prima facie discriminatory, err in refusing to consider the validity of the test because a number of other black employees were ultimately selected for the positions at issue?

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights to all Americans. The Committee has, over the past eighteen years, enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor. It has participated in a number of cases seeking, under Title VII of the Civil Rights Act of 1964,

to redress employment discrimination in the public and private sectors. The impact of paper and pencil tests upon minority opportunities for employment has been of considerable concern to the Committee, particularly in the recent case of *Luevano v. Campbell*, Civ. Action No. 79-0231 (D.D.C.), involving the validity of the so-called PACE test for professional employment in the federal service. Since the "bottom line" theory at issue in this case has general implications for both public and private employment opportunities, the Committee would like to present its views to the Court.

Written consents of both parties to the submission of this brief are being filed with the Clerk in accordance with Rule 36.1 of the Rules of this Court.

STATEMENT

The facts essential to the determination of the issue before this Court are not in dispute and appear for the most part in the opinion of the Court of Appeals.

The four respondents are black employees of the Department of Income Maintenance of the State of Connecticut who were promoted provisionally to the position of Welfare Eligibility Supervisor and served in that capacity for periods in excess of two years. To attain permanent status in such positions, they had to pass a written examination. Only if they passed that examination would they become part of an eligibility pool from which permanent appointments would be made on the basis of various criteria, including past performance, recommendations of supervisors, interest in the work, seniority, etc.

Respondents failed the written test and thus became ineligible for further consideration for promotion to positions as supervisors. Of the 329 persons who took the test, 48 were identified as black and 259 as white.

With a passing grade set at 65,[1] 54.17% (26 in number) of the black candidates and 79.53% (206 in number) of the white candidates passed the examination. The passing rate for black candidates was thus 68% of the passing rate for whites.

The results of the examination were announced in March 1979. In April, respondents instituted this action against the State of Connecticut and the individual defendants, alleging *inter alia* a violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*) by the requirement, as an absolute condition for consideration for promotion, of the passing of a written test which excluded blacks in disproportionate numbers and which was not job related. While the case was pending, the State made appointments to the permanent supervisory positions. Forty-six persons, 11 blacks and 35 whites, were appointed. Thus, 23% of the blacks and 13.5% of the whites who began the selection process were promoted.

The district court, relying on the opinion of Judge Newman in *Brown v. New Haven Civil Service Board*, 474 F. Supp. 1256, 1260 (D. Conn. 1979), dismissed the Title VII claim. It adopted the reasoning of the New Haven decision that, even though the passing rates on the examination showed a *prima facie* case of adverse impact upon minorities, the "ultimate results of the entire hiring process, however, show that no *prima facie* case of adverse impact is established." It therefore found it unnecessary to rule upon the state's claim that the examination was job-related. (R. 19-20.)

The court of appeals reversed. It held that the district court erred in ruling that the results of the written examination alone were insufficient to support a *prima*

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[1] The passing grade was set at 65, although the mean score on the examination was 70.4 because black candidates had a mean score 6.7 percentage points lower than the white candidates.

facie case of disparate impact in violation of Title VII. It drew a distinction between the situation where all the candidates participate in the entire selection process and the overall results reveal no significant disparity; and the situation, such as that in the instant case, where "an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process." To deny the applicability of Title VII in the latter situation, the court said, would be to interpret Title VII to protect faceless groups rather than individuals. It noted:

> Where an employment practice forecloses a disproportionate number of persons in a protected group from a job, it matters very little to the victimized individuals that their group as a whole is well represented in the group of hirees.

Accordingly, the court of appeals remanded the cause to the district court for a determination of the job-relatedness of the examination in question.

SUMMARY OF ARGUMENT

I

The district court's decision dismissing the cause of action and the court of appeals' opinion reversing it both proceed on the assumption that, if the test at issue were considered by itself, it would be deemed *prima facie* discriminatory under the principles announced in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and the 1978 Uniform Guidelines on Employee Selection Procedures. The only reason that the district court deemed it unnecessary to pass on the job-relatedness of the test was that, in the final selection, the State of Connecticut appointed a number of blacks, other than these respondents, to the vacant supervisory positions. Thus, the essence of the position of petitioners, which the government supports, is that an employer may discriminate against one group of blacks if it favors another group.

The court of appeals properly ruled that discrimination against these respondents on the basis of race cannot be justified because other members of their race received favorable treatment. If an employer decided that it would employ only light skinned blacks, it would be discriminating against dark skinned blacks on the basis of their race, no matter how many light skinned blacks it employed. The test here operated in the same fashion. It excluded from consideration for promotion on the basis of race a particular group of blacks who, in the present posture of the case, must be regarded as lacking only non-job-related characteristics. This is discrimination on the basis of race, no matter how many other blacks were ultimately appointed.

The fact that the employer achieved a racially balanced work force in its ultimate hiring policy does not excuse racial discrimination against individuals who were excluded from consideration by the discriminatory examination. *See Furnco Construction Co. v. Waters*, 438 U.S. 567, 579 (1978).

It is the barrier effect of the test at issue which lies at the heart of the court of appeals' decision. If the test here were only one part of the selection process which did not bar respondents from further consideration, their experience, supervisory recommendations, interest in the job, and seniority may well have overcome the effect of the test. In that situation, the "bottom line" theory makes sense. It is not reasonable to try to determine the impact of a test or any other intermediate step in a multi-faceted process if the overall result shows no discriminatory impact. There is, however, a significant difference between the need to consider the fairness of one of many factors entering into a total result and the need to consider the fairness of a distinct criterion which, if not satisfied, totally excludes further consideration.

The government's policy of not bringing enforcement actions if the overall effect of a selection process is not exclusionary is admittedly an exercise of prosecutorial discretion. Whether the exercise of that discretion is wise or unwise, it cannot determine the individual rights of these respondents.

The fallacy of petitioners' position is that it interprets Title VII with respect to disparate impact cases as protecting group, but not individual rights. Title VII's primary focus, however, is on the individual. *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). Respondents, as individuals, have the right not to have their opportunity for promotion cut off by a racially biased, non-job-related test.

II

The contention that the test at issue is not subject to attack because it falls within the protection of Section 703(h) of Title VII as part of a bona fide merit system is not properly before this Court, since the issue was not decided below and was not raised in the petition for a writ of certiorari. *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 62 n.4 (1959).

The contention is, in any event, without merit. It was specifically rejected by the Second Circuit in *Association against Discrimination v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *petitions for cert. filed*, 50 U.S.L.W. 3134 (Aug. 25, 26, 1981). Other courts of appeals have assumed that racially biased non-job-related civil service examinations are subject to attack under Title VII. The legislative history of the 1972 amendments, which brought state and local governments under Title VII, shows that Congress, which was well aware of the *Griggs* standard, intended to have it apply to state and local examinations.

ARGUMENT

I

THE RIGHTS OF THE INDIVIDUAL RESPONDENTS UNDER TITLE VII WERE VIOLATED BY A TEST WHICH DISCRIMINATORILY EXCLUDED THEM FROM CONSIDERATION FOR PROMOTION ON THE BASIS OF RACE.

A. The "Bottom Line" Interpretation Urged by Petitioners and the Government Fails to Give Effect to Congress' Purpose in Title VII of Protecting All Individuals from Racial Discrimination by Employers to Whom the Act Applies.

The essence of the "bottom line" theory, as interpreted by the district court and supported by petitioners and the government, is that an employer may exclude one group of blacks on the basis of race if it favors another group of blacks for the same position. Both the district court and the court of appeals, in their decisions, recognized that if the test at issue was the sole determinant for promotion, the disparity in the rate of success of black and white candidates established a *prima facie* case of race discrimination under the principles enunciated by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Those principles have been given specificity by the government's 1978 Uniform Guidelines on Employee Selection Procedures, which provide that a selection rate for any race which is less than 80% of the group with the highest rate will generally be regarded as evidence of adverse impact. 28 C.F.R. § 50.14 (1978).[2]

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[2] Petitioners suggest that, contrary to the above cases and the guidelines, the pass-fail ratio should not be enough to establish a *prima facie* case of discrimination without a showing of "invidiousness." (Pet. Br. 16-18.) As we discuss *infra* with respect to petitioners' contention that the tests are protected as part of a merit system, no such issue is properly before the Court in this case.

If the State of Connecticut had, for any reason, failed to fill the positions at issue before the case was tried, there is no doubt that the district court would have found it necessary to decide the job-relatedness of the test under attack. The only reason the district court found it unnecessary to determine job-relatedness was that, in the overall selection, a number of blacks who had passed the test were appointed as supervisors.[3] Thus, the discriminatory effect (which must be presumed at this juncture) of the test on these respondents is sought to be justified on the basis of the treatment of other blacks.[4]

No such issue was decided by the courts below and no such issue was raised in the petition for a writ of certiorari.

In any event, petitioners' contention is without support. While *Griggs v. Duke Power, supra,* arose in a state which historically had operated segregated school systems, no court of which we are aware has held that fact to be controlling. Racially biased tests have not, unfortunately, been confined to any part of the country. Even the federal government has failed adequately to consider the factor of racial bias in some of its tests. *See Douglas v. Hampton,* 512 F.2d 976 (D.C. Cir. 1975). For a discussion of the historical mistakes in examinations and the need for care in the testing process, *see* S. Gould, THE MISMEASURE OF MAN (1981).

As we discuss *infra,* Congress, when it amended Title VII to cover state and local governments, intended such entities to be subject to the same standards as private employers.

Petitioners' arguments as to the Tower amendment were discussed and rejected by this Court in *Griggs, supra.* That decision also established that a showing of intent to discriminate is not necessary to prove a violation of Title VII based on disparate impact.

[3] We do not mean to suggest that the state acted improperly in filling the positions or that it did so with intent to avoid a determination of the validity of the test. We merely emphasize that adjudication of the test on its own merits was deemed unnecessary because of later occurring events.

[4] The state suggests that there is no evidence that the appointment of blacks who passed the test to fill the vacant positions was the result of affirmative action. This is irrelevant. Whatever the reason for the high percentage of blacks appointed, the fact is that the adverse impact of the test on respondent blacks is sought to be justified by the appointment of other blacks.

The court of appeals properly ruled that discrimination against some individuals on the basis of their race cannot be justified because other members of their group received favorable treatment. If an employer decided that he would employ only light-skinned blacks, he would be discriminating against dark-skinned blacks because of their race, no matter how many light-skinned blacks he employed. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), where the Court recognized that a rule applying only to married women with children was discrimination on the basis of sex even though female employees without children were not affected thereby. The test at issue here, assuming as we must for present purposes that it was racially biased, operated in much the same way. It excluded from consideration for promotion on the basis of race a particular group of blacks who did not possess non-job-related characteristics. This is discrimination on the basis of race, no matter how many blacks were ultimately appointed. As this Court said in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978), "A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." The Court added (438 U.S. at p. 579):

> It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force.

While *Furnco* referred to existing racial balance in the work force, the principle it enunciated applies here. The fact that the employer achieves a racially balanced work force in its ultimate hiring policy does not excuse racial discrimination against individuals who were excluded by the discriminatory examination.

The district court, and the *Brown* opinion on which it relied (see *supra*, p. 3), drew a distinction between intentional discrimination against particular individuals in the selection process and the situation here, where the

exclusion of particular individuals comes from the disparate impact of a selection device, such as a test. They admit that, under *Furnco, supra*, intentional discrimination against particular black individuals cannot be justified by the fact that a sufficient number of other blacks are ultimately selected. A barrier, however, remains a barrier, whether or not it was intended as such. A person kept out by a closed door is as much excluded by a door blown shut as by one deliberately closed. This Court established in *Griggs v. Duke Power Co., supra*, that the adverse impact of a barrier, such as a racially biased, non-job-related test, constituted a violation of Title VII, whether or not the employer who used it intended to discriminate. Since that is so, an individual member of a minority race has a right, under Title VII, not to be excluded from promotion by a racially discriminatory, non-job-related test, whatever the intentions of the employer who gives the test. Title VII confers rights on individuals, not only on groups. A barrier to individual advancement, if it is based on race, cannot be justified because some other members of the race have managed to leap that barrier.

If, in a litigated case, a test was adjudicated to be racially biased and non-job related under the standard of *Griggs*, a court, in fashioning relief, would not make the plaintiffs whole by requiring only that the employer hire a number of blacks who had managed to pass the racially biased test. How then can the appointment of blacks who passed the test be a proper consideration in the determination of the validity of the test?

B. The Decision of the Court of Appeals Below Does Not Require Separate Validation of Individual Test Items or Factors Applied to All Applicants in a Single-Step Selection Process.

It is the barrier effect of the test on respondents which lies at the heart of the decision of the court of appeals. The "bottom line" theory, which looks to the overall result of a selection process in determining ad-

verse impact, makes sense where no one aspect of the process is given controlling weight. As the court of appeals pointed out, where "all of the candidates participate in the entire selection process and the overall results reveal no significant disparity of impact, scrutiny of individual questions or sub-tests would conflict with the dictates of common sense." The situation, it noted, is different "where an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process."

Thus, if the test here were only one part of the selection process which did not bar respondents from further consideration, the district court would have been justified in declining to determine the impact of the test alone. If experience, attitude, seniority, etc. were weighed with the test, it could not be said that the test alone was the barrier to the promotion of respondents. It might very well be that other factors would have overcome whatever deficiencies were shown by the test. It is manifestly different, with respect to the individuals involved, that the test here was an absolute bar to their further consideration for the position, so that none of the other factors in their favor could be considered. If five persons had to conduct interviews to rate a candidate, even if one had an unconscious bias against a particular type of minority, a total result showing no significant disparity would justify the conclusion that the various interviewers counterbalanced each other. The situation would be entirely different if the one interviewer determined whether candidates would be further considered and there was a significant disparity in the number of blacks to be further considered. If he were shown to be biased against a particular kind of minority because of some non-job-related characteristic, the selection process would manifestly be tainted no matter how many other minorities of the kind he approved of were

ultimately selected. There is, in short, a big difference between absolute exclusion and consideration of one of many factors. For this reason, it does not follow, as petitioners would have it (Pet. Br. 27), that the opinion below would require each question on a test or each step in a many-faceted selection process to be subject to analysis for racial impact. It is only where one distinct step in the process is determinative of the right to further consideration that such a step could be said to be a barrier to employment opportunity. If it is such a barrier, and the barrier is discriminatory against individuals on the basis of their race, then, as the court of appeals held, Title VII grants such individuals the right to have that barrier removed.

The government suggests that, even if one step, such as a test, is not an absolute barrier to further consideration, it may in some instances operate as such because it may be given enough weight to turn the balance against an individual. It is true that perfect justice may not always be achieved in a multi-faceted process because undue weight may be given to some factor. But the fact that perfect justice is not always possible is hardly a basis for allowing gross injustice to go unchallenged. That it may be realistically impossible to evaluate each component of a multi-faceted process hardly justifies the failure to judge the fairness of a particular, defined step in the process which determines the right of particular individuals to be further considered.

The fallacy of petitioners' position is that they interpret Title VII with respect to disparate impact cases as protecting group rights, but not as conferring rights upon particular individuals. As the court of appeals stated, their position would interpret Title VII as protecting "faceless groups," not persons. But Title VII does confer rights on individuals. It gives each individual

injured by discriminatory action the right to file charges and to bring an action to remedy the injury which such individual personally suffered as the result of the discriminatory action. *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978). As the Court there said, the "statute's focus on the individual is unambiguous." It is true that, in proving a disparate impact case, it is necessary to look at group statistics to determine whether a particular requirement unfairly acts as a barrier to a protected class. But the fact that group disparity is a means of proving that a barrier exists does not require that only the group, and not the individual kept out by that barrier, has the right to seek removal of the barrier. Rather, as the *Manhart* case holds, individuals suffering from discriminatory treatment have the right to seek redress for the injury so sustained.

C. The Uniform Guidelines Adopt A "Bottom Line" Theory to Guide the Exercise of Prosecutorial Discretion But They Do Not Constitute An Interpretation of the Substantive Meaning Of Title VII to be Followed by the Courts.

The 1978 Uniform Guidelines on Employee Selection Procedures, *supra*, state that, as a matter of prosecutorial discretion, the federal enforcement agencies will not, if the overall effect of a selection process is not exclusionary, examine the individual components of that process for adverse impact. That policy does not determine this case. The policy, which is admittedly an exercise of prosecutorial discretion, does not fix the rights of individuals. Prosecutorial discretion does not define or determine rights. If the United States Attorney for the Southern District of New York decided that his office should not prosecute cases of cars stolen in New Jersey and transported to New York, that might very well be a sound exercise of discretion in making effective use of limited resources. It would not make the interstate

transportation of the stolen vehicle legal or prevent the individual owner, if he could identify the thief, from seeking to recover damages sustained as the result of the theft. So here, whether the government's policy is wise or unwise, the claims of the individual respondents cannot be affected thereby.

The opinion of Judge Newman in the *Brown* case, on which the district court relied, urged the adoption of the "bottom line" theory as a means of encouraging affirmative action. But, as petitioners themselves suggest in stating that there is no proof that the appointments here were influenced by affirmative action principles, this case does not involve any issues as to affirmative action. Presumably the government believes that its "bottom line" approach will encourage employers to take affirmative action to avoid the necessity of validating such tests as they may wish to use. Whether that policy is wise or unwise is not a matter which is material to the rights of these respondents. The issue of when it is appropriate for an employer to undertake affirmative action to remedy past discrimination against a class or to seek to achieve an integrated work force is not presented by this case. Nor is this an appropriate vehicle to decide whether it is better for minorities as a whole to be subject to fair employment procedures rather than to the continuation of an unfair procedure by the adoption of compensating measures. What is at issue here is the right of particular individuals not to have their opportunity for promotion cut off by a racially biased, non-job-related test. The court of appeals properly held that, if the test at issue here is such a test, respondents have personally been injured thereby regardless of how many blacks were appointed to the position. Respondents thus have a right, under Title VII, to have a court determine whether the test is valid or whether it is an unfair, racially biased barrier to their consideration for promotion.

II

A RACIALLY DISCRIMINATORY, NON-JOB-RELATED PROMOTION TEST IS NOT A BONA FIDE MERIT SYSTEM WITHIN THE PURVIEW OF SECTION 703(h) OF TITLE VII

Petitioners contend (Pet. Br. 28-37) that, whether or not the promotion test at issue has a disparate impact on blacks within the principles of *Griggs v. Duke Power*, and the Uniform Guidelines on Employee Selection Procedures (see *supra* p. 7), the test is not subject to attack because it falls within the protection of Section 703(h) of Title VII. That section states that it is not an unlawful employment practice for an employer to apply different standards pursuant to a bona fide merit system, provided such differences are not the result of an intention to discriminate. The argument based on Section 703(h) (Pet. Br. 28-37) is not properly before this Court. The contention was not, so far as we are able to ascertain, advanced in the district court or the court of appeals. It certainly was not decided by either court. It was not raised as a question presented or argued in the petition for a writ of certiorari. This Court does not consider issues not decided below and not raised in the petition for a writ of certiorari. *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 62, n.4 (1959).

The contention that Section 703(h) protects the test at issue is, in any event, without merit. The Court of Appeals for the Second Circuit has expressly rejected a similar contention, pointing out that there are two reasons why the merit system exemption of Section 703(h) does not apply to biased, non-job-related civil service examinations. *Association against Discrimination v. City of Bridgeport*, *supra* p. 6. The court noted that, where an examination serves to discriminate against minorities, it is being used to discriminate. More fundamentally, the court held (247 F.2d at p. 273), "it would

defy reason to characterize as a 'bona fide merit system' a test that does not measure the fitness of those who take it for the positions to be filled according to its results."

While other circuit courts of appeals have not dealt specifically with the merit system contention which petitioners urge here, they have upheld attacks on civil service examinations as discriminatory under Title VII. *Firefighters Institute v. City of St. Louis*, 549 F.2d 506 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977); *see also id.*, 616 F.2d 350 (8th Cir. 1980), *Scott v. City of Anniston*, 597 F.2d 897 (5th Cir.), *cert. denied*, 446 U.S. 917 (1979); *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); *United States v. City of Chicago*, 573 F.2d 916 (7th Cir. 1978).

In ruling that the *Griggs* standard (which does not require a showing of intent to establish a violation of Title VII based on disparate impact) applies in actions against states and municipalities, the Ninth Circuit in *Blake*, *supra*, and the Seventh Circuit in *City of Chicago*, *supra*, relied on the legislative history of the 1972 amendments to Title VII which brought state and local governments within the coverage of Title VII. That legislative history shows that Congress enacted the 1972 amendments after taking notice that "wide spread discrimination against minorities exists in State and local government employment." H.R. Rep. 92-238, 92d Cong., 1st Sess., p. 17 (1971). It referred to a study by the U.S. Commission on Civil Rights which had found discrimination in state and local governments, north and south, perpetuated by various means, including "invalid selection techniques" (*ibid.*). As this Court said in *Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14 (1977), "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike. See H.R. Rep. No. 92-238, 92d Cong., 1st Sess., p. 17 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess., p. 10 (1971). Thus Congress, which

was well aware of the *Griggs* standard with respect to tests, intended those standards to apply to state and local governments. It manifestly did not deem such tests to fall within the exemption of the 1965 Act for bona fide merit systems.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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October Term, 1981

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, individually and in his official capacity; and EDWARD W. MAHER, individually and in his official capacity,

Petitioners,

vs.

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JEANNIE PICK and LINDA BROOKS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Brief of the National League of Cities and the National Public Employer Labor Relations Association as Amici Curiae in Support of the Petitioners.

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Brief of the National League of Cities and the National Public Employer Labor Relations Association as Amici Curiae in Support of the Petitioners.

I.
INTEREST OF THE AMICI CURIAE.

The Amici, hereinafter described, file this Brief because of their concern with numerous issues presented herein, including but not limited to the following:

(1) If one of numerous components in a multi-component selection process is a "knock-out," does this render inapplicable the bottom line approach?

(2) Will bottom line statistics be viewed, as is proper, as a superior form of statistic to component statistics, and thus the statistics to which the appropriate test of statistical significance is applied, or will such statistics be viewed improperly as a defense and, further, a defense which can only be established by proving bottom line *equivalence*?

For the reasons hereinafter set forth, this Court's answers to these questions will seriously affect the ability of employers in general and governmental employers in particular to use tests as component of selection processes, the costs of administering selection processes, the frequency with which expensive validation efforts must be undertaken, and the incentive to engage in affirmative action.

This Brief is submitted on behalf of Amici Curiae, the National League of Cities (NLC) and the National Public Employer Labor Relations Association. Written consent of all parties to the filing of this Brief has been obtained, and letters of consent to such filing are on file with the Clerk of this Court.

The NLC is an instrumentality of cities in the United States. It was established in 1924 and organized in 1933 as an Illinois not-for-profit corporation to assist municipalities in performing their functions. Its membership includes direct member cities, state leagues of municipalities, and state league member cities. Almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of the NLC. The functions of the NLC as authorized in its Bylaws include "the safeguarding of the interests, rights, and privileges of municipalities."

The National Public Employer Labor Relations Association is a public organization comprised of city, county, state, and local school district directors of personnel and employee relations. This organization represents approxi-

mately 750 public jurisdictions in all fifty states. Its members formulate, implement, and administer labor relations policies and practices for these public jurisdictions.

II.
STATEMENT OF THE CASE.

The facts surrounding this dispute are set forth at length in the briefs of the parties, and in the decision of the Second Circuit[1] and will not be repeated herein. Amici wish, however, to underscore three significant facts. The first is that this is a disparate impact and not a disparate treatment case.[2]

Second, the selection process at issue herein was a multi-component selection process, with the first component being a written examination, followed by consideration of (a) past work performance; (b) supervisors' recommendations; (c) the candidates' seniority; and (d) affirmative action considerations. Candidates who did not obtain a passing score of sixty-five on the written examination component of the selection process were "knocked out" of consideration and were not evaluated in light of the other four components in the selection process.[3]

Finally, the plaintiffs below instituted this action after they failed to obtain the minimum passing score of sixty-five in the examination component of the selection process, but before the entire selection process had been completed and before it was known whether or not the total selection process for promotion to permanent Welfare Eligibility Supervisor had a substantial adverse impact upon blacks. After suit was instituted, but prior to the time of trial, the entire

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[1] *Teal v. State of Connecticut*, 645 F.2d 133 (2d Cir.), *cert. granted*, ____ U.S. ____ (1981).

[2] Although the plaintiffs asserted their claims under both theories, the district court determined that only the disparate impact analysis was appropriate. *Id.* at 136. The Second Circuit agreed. *Id.* at 137. The record and the Second Circuit opinion reveal no evidence of disparate treatment.

[3] *Id.* at 135.

selection process was completed,[4] with no adverse impact upon blacks. The selection rate for blacks was approximately 170% of the selection rate for whites.

III.
SUMMARY OF ARGUMENT.

In *Hazelwood School District v. United States*,[5] this Court recognized that in choosing between statistics which are probative, some statistics are more probative than others.[6] In *Hazelwood*, this Court held that although a plaintiff could establish a prima facie case by demonstrating a substantial statistical disparity between the percentage of teachers in the relevant geographic area who were black and the percentage of teachers employed by the school district who

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[4] *Id.* at 136. The record reveals the following time sequence:
December 2, 1978 — examination given. *Id.* at 135.
March 15, 1979 — according to amended complaint, results of examination announced. *See* Joint Appendix, p. 6.
April 6, 1979 — docket sheet states that action was filed. *See* Joint Appendix, p. 2.
May 5, 1980 — amended complaint filed. This was apparently after the selection process was completed since the Second Circuit opinion reveals that the promotions were made approximately a month before trial. 645 F.2d at 136.
May 13, 1980 — answer filed.
May 27-28, 1980 — trial held. *See* Joint Appendix, p. 2.
The record does not reveal why the plaintiffs did not follow the normal course of submitting a Title VII charge to the EEOC, awaiting the 60-day deferral period to an applicable state or local governmental agency, allowing the EEOC to investigate the case, and if cause is found, allowing the EEOC to attempt to secure a conciliation agreement, and, failing that, referring the case to the Attorney General who may bring a civil action. This procedure is set forth in § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1). In any case, it was the plaintiffs' choice to file suit immediately after the examination results were announced, rather than protecting their rights by filing an EEOC charge, and awaiting the conclusion of the selection process.

[5] 433 U.S. 299 (1977).

[6] *See also Teamsters v. United States*, 431 U.S. 324, 340 (1977) ("We caution . . . that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.").

were black, the case should be remanded to ascertain a superior statistical comparison: whether there was a substantial statistical disparity between the percentage of teachers who were black in the relevant geographic area and the percentage of teachers hired by Hazelwood during the relevant time-frame who were black. This Court thus held that "time-frame" or "flow" statistics are more probative than "static" or "snapshot" statistics.[7] Of critical importance to the instant case, this Court held in *Hazelwood* that on remand *the relevant test of statistical significance*[8] *would be applied to the superior statistics, the flow statistics, and*

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[7]"Time-frame" or "flow" statistics focus on employment decisions made during the time-frame relevant to the litigation. "Snapshot" statistics focus on the overall makeup of the employer's work force at one moment in time, although in most instances that work force is determined by employment decisions made over several decades.

[8]The issue of what is the relevant test of statistical significance is not before the Court in this case. If the statistics are not finely tuned, such as a comparison of the percentage of minorities in the employer's work force to the percentage of minorities in the general population, this Court has held that the statistical disparity must be "gross." *Teamsters v. United States, supra* note 6 at 337-38 and nn. 20, 23 & 24. If the statistics are finely tuned, there are at least three possible tests for statistical significance: (1) the .05 level of statistical significance; (2) the "two or three standard deviations" test set forth in *Hazelwood, supra* note 5; and (3) the four-fifths or 80% rule set forth in the Uniform Guidelines of Employee Selection Procedures prepared by the Equal Employment Opportunity Commission, 29 C.F.R. § 1607.4(D) (1981). The .05 level of statistical significance means that the probability of the statistical disparity occurring by chance is 5%. It has become a convention in social science to accept as statistically significant values which have a probability of occurring by chance not more than 5% of the time. *See Contreras v. City of Los Angeles,* ____ F.2d ____ n. 3 (9th Cir. 1981) (the .05 level of statistical significance is generally recognized as the point at which statisticians draw conclusions from statistical data). *See generally* D. Baldus & J. Cole, *Statistical Proof of Discrimination,* § 9.221 at 308 n. 36. The .05 level of statistical significance test is generally consistent with the two or three standards deviation test set forth in *Hazelwood, supra* note 5. Actually, 1.96 standard deviations equates with the .05 level of statistical confidence. D. Baldus & J. Cole, *supra,* § 9.0 at 297. The four-fifths or 80% rule set forth in the Uniform Selection Procedures has been sharply criticized. Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII,* 91 HARV. L. REV. 793, 805 (1978).

that to rebut the plaintiff's prima facie statistical proof case, the employer need not prove the total absence of any disparity.[9] In *Hazelwood*, there was no burden on the employer to prove, through the superior "flow" statistics, that its hiring of blacks during the relevant time-frame exactly equated with or exceeded the black applicant flow; it was sufficient if an analysis of the superior statistics revealed an absence of a substantial statistical disparity.[10]

"Bottom line" statistics, which analyze the entire employment process, are a superior form of statistics to "component" statistics, which analyze only one component of the selection process.[11] "Bottom line" statistics are superior to "component" statistics in exactly the same way that "flow" statistics are superior to "snapshot" statistics — they present a more realistic picture of what is actually happening in the selection processes at issue in the litigation. As in *Hazelwood*, if proper component and bottom line statistics are both presented to the Court, it is to the superior bottom line statistics that the applicable test of statistical significance must be applied.[12]

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[9]Thus, in *Hazelwood*, this Court indicated that the test of statistical significance applied to the superior "flow" statistics would be the same as the test applied to the "snapshot" statistics. *Compare Hazelwood School District v. United States*, 433 U.S. at 308 n. 14 (analysis of snapshot statistics) *with* 433 U.S. at 311 n. 17 (analysis of "flow" statistics). Both suggested analyses utilize the "two or three standard deviations" test.

[10]These principles are thoroughly analyzed in Schlei and Grossman, *Employment Discrimination Law, Supplement* (BNA 1979) (hereinafter cited as *Supplement*) at 296-305 and 318-29. It should be noted that one of the counsel for amici is a co-author thereof.

[11]*See* Schlei and Grossman, *Supplement* at 329 ("The Problem of Conflicting Statistical Conclusions: . . . '[B]ottom line' statistics are normally more probative than 'component part' statistics.' ").

[12]As noted, the issue of what is the appropriate test of statistical significance is not before the Court. *See* note 8, *supra*.

In this case, Connecticut can prove not only the lack of a bottom line significant statistical disparity, not only bottom line equivalence, but bottom line statistics actually favoring blacks. Amici fear that because of this factual context, this Court might in its opinion use language which could be construed as requiring all bottom line statistics to be analyzed under an "equivalence" test rather than recognizing that as a superior source of statistics, bottom line statistics are *the* statistics to which the applicable test of statistical significance must be applied.

The Second Circuit, although accepting the basic concept that the components of a selection process will not normally be evaluated for disparate impact if the bottom line shows no such impact, erroneously concluded that this principle is inapplicable if the component in question is a "pass-fail" barrier. This conclusion was based on the Second Circuit's confusion between the disparate treatment and disparate impact theories of discrimination.

It is of course true under the disparate treatment theory that an employer remains liable for an individual act of intentional discrimination despite good statistics.[13] Furthermore, in both disparate treatment and disparate impact cases, an employer who for a period of time has discriminated with respect to completed employment decisions cannot immunize such acts by a later change in its practices.[14] However, neither of these principles in any way affects the essential nature of the disparate impact theory of discrim-

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[13]*Furnco Construction Corp v. Waters*, 438 U.S. 567, 579 (1978) ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.").

[14]*Teamsters v. United States*, 431 U.S. 324, 341-42 (1977) ("[T]he company had engaged in a course of discrimination that continued well after the effective date of Title VII. The company's later changes in its hiring and promotion policies could be of little comfort to the victims of the earlier post-Act discrimination, and could not erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it.").

ination — that an individual has rights only because of the effect of a process of selection on the overall group of which the individual is a member. Winnie Teal's right to recover against the State of Connecticut is totally dependent on how the State of Connecticut's selection devices affect *other blacks*. It makes no difference whether the test that Winnie Teal failed to pass was the first or last stage of a multi-component selection process. The important thing for her is whether she received the promotion. The important thing for her lawsuit is whether the selection process in question resulted in a substantial disparate impact against the group to which she belonged, blacks.[15]

The Second Circuit's conclusion that Connecticut would have prevailed if it had reached exactly the same result by waiting until the end of the selection process and then subjectively analyzing all components, rather than eliminating persons who scored at an unacceptably low level on the written test component, clearly ignores the direction of this Court that a court of appeals, based on its concept of fairness, absent illegality, should not require employers to restructure their employment procedures.[16]

It is bothersome that the defendant in a lawsuit can determine the result thereof by actions it takes a year after the complaint is filed, one month before trial. This is probably the unstated explanation for the Second Circuit's decision.

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[15]This is not a case of an employer who intentionally discriminated against a specific individual, and tried to defend based on a balanced work force (disparate treatment case), or an employer who, with a qualified applicant flow that was 20% black, hired blacks at a 5% rate for many years until litigation began, and then hired blacks at a rate far in excess of 20%, and tried to defend based on an overall average of its hiring rate for pre-suit and post-suit years, lumped together (change from pattern of discrimination to pattern of nondiscrimination in final employment decisions).

[16]*Furnco Construction Corp. v. Waters*, 438 U.S. at 578 ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.").

However, it was the plaintiff and not the defendant who chose to rush to court before all the facts were in, and without waiting for the normal conclusion of the administrative process.[17]

IV.
ARGUMENT.

A. The Nature of Disparate Treatment.

The essence of disparate treatment is different treatment, that a member of a protected group was treated differently and less favorably than such person would have been treated had he or she been white or male.[18] Assuming that the above can be established, it matters not at all how the employer treats other individuals in the plaintiff's protected group. The essence of disparate treatment is individual rights. For example, if the supervisor of Winnie Teal and the other respondents refused to allow them to take the test at issue because of racial animus, whereas all other applicants were permitted to take the test, this would be a classic example of disparate treatment, and Connecticut's liability to Teal would be unaffected by the fact that the selection process ultimately resulted in a selection rate for black applicants 170% that of white applicants.

The concept that good statistics will not redeem an act of intentional disparate treatment is established by *Phillips v. Martin Marietta Corp.*[19] In *Phillips*, the employer refused to accept applications from females with preschool children while accepting such applications from males with preschool children. Thus, a woman with a three-year-old child would not be hired, whereas a similarly situated man with a three-

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[17]*See* note 4, *supra*.

[18]*Teamsters v. United States*, 431 U.S. 324, 335-36 n. 15 (1977) ("The employer simply treats some people less favorably than others because of their race . . . . Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.").

[19]400 U.S. 542 (1971).

year-old child would be hired. Both lower courts held for the employer since "70-75% of the applicants for the position . . . were women; 75-80% of those hired for the position . . . were women . . . ."[20] This Court quite correctly reversed, holding that one hiring policy for women and another for men, clear disparate treatment, is not redeemed by statistics showing that women in general are fairly treated.[21]

B. The Nature of the Disparate Impact Theory.

1. General Description.

This Court has described the disparate impact theory as follows:

> "Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate impact theory."[22]

2. Unlike the Disparate Treatment Theory, Which Focuses on Individual Rights, Under the Disparate Impact Theory, Individual Rights Are Based Not on How the Individual Is Treated but on How the Protected Group to Which the Individual Belongs Is Treated.

The Second Circuit held that Winnie Teal, eliminated from consideration because she failed to achieve a passing score on a test, could not have her rights determined by how the employer treated other members of her protected

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[20] *Id.* at 543.
[21] *Id.* at 544.
[22] *Teamsters v. United States*, 431 U.S. at 335-36 n. 15. *See also Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) ("Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.") (Emphasis in original).

group. In so holding the Second Circuit totally misconceived the nature of the disparate impact theory, in which individual rights can only exist based upon the employer's treatment of a much larger group of persons to whom the plaintiff belongs.

For example, assume that the State of Connecticut is hiring 1,000 highway patrol officers from among 10,000 applicants, and the sole criterion for selection is performance on an unvalidated written test. The exact same test is given under identical conditions which protect confidentiality at ten different locations throughout the state on ten consecutive Saturdays, no selections will be made until the test is given at all ten locations, and a passing score of sixty-five is required for hiring consideration. Assume that 1,000 applicants take the test at each location, that Teal and the other respondents take the test in Hartford on the first Saturday it is given, receive their test scores two days later, and fail to meet the minimum standards for consideration for hiring. Of the 1,000 persons who took the test, 50% of the whites who took the test on the first Saturday passed it whereas only 35% of the blacks who took the test on that date passed it. Is the selection process illegal? Does Teal have a right to recover? The answer is that we do not know. The selection process is final as to her, but we do not know if she has a right to recover because under the disparate impact theory, her right to recover is dependent upon how her group fares with respect to the selection process, and all the results are not yet in. If, in the above example, blacks perform well at the other nine locations, and when all the results are in the test does not have a substantial adverse impact upon blacks, Teal will not recover even though she failed the test and even though blacks taking the test at the Hartford location failed the test at a statistically significant higher rate than whites.

Another example will demonstrate this principle. An employer is opening a new factory and it is hiring 100 em-

ployees, all to do routine assembly work. As its sole criterion for hire, the employer uses a test, which it has designed, which has not been validated, and whose disparate impact, if any, is unknown. If the first person applying is Winnie Teal, and Teal fails the test and is not hired, the sample size at this juncture is too small to determine whether the test has a statistically significant impact upon blacks. Whether or not Teal has a cause of action would be dependent upon whether, if ever, enough persons and enough blacks take the test to form a statistically significant sample, and what effect the test has on persons who have not yet applied for work.[23]

Each of the above examples is illustrative of the proper analysis of the instant case. Teal's position is no different when she failed the first of ten sessions of the test than the position she occupies in the actual case before this Court. In each case, her rights are dependent upon how the process treats other members of her protected group. Teal's rights in the hypothetical where she is the first applicant for the 100 assembly positions is again identical; whether she prevails will be dependent upon how the selection process in question treats other members of her group.

3. This Is Not a Case Where Completed Employment Actions by the Employer Establish Discrimination at the Time Suit Is Filed, and the Employer Attempts to Defend on the Basis of Changed Practices Occurring After Suit Was Filed.

Assume that during the pre-suit portion of the time-frame relevant to a particular lawsuit the black component of the qualified applicant flow and the black hiring rate were as follows:

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[23]Numerous courts have recognized that the disparate impact theory cannot be premised on an excessively small sample size. *See generally* Schlei and Grossman, *Supplement* at 328-29 n. 124 and accompanying text. If in the above example Teal filed suit immediately after being rejected and the employer, who as of that date had given the test only to a small number of applicants, abandons the test, Teal could not recover under the disparate impact theory.

	Qualified Black Applicant Flow	Black Hiring
1975	20%	5%
1976	20%	5%
1977	20%	5%

Assume that the lawsuit is filed on January 1, 1978, that trial begins on January 1, 1981, and during the three years between the filing of suit and trial the relevant hiring statistics are as follows:

	Qualified Black Applicant Flow	Black Hiring
1978	20%	35%
1979	20%	35%
1980	20%	35%
Average for all six years	20%	20%

Under the above example, the employer's liability for its pre-suit practices would be unaffected by its substantially increased black hiring after suit was filed.[24] In the hypothetical, the employment decisions during the pre-suit years were final, and the employer's change in its hiring practices could not affect those who were the victims of discrimination in the pre-suit years.

The facts herein are absolutely distinguishable from the "in the face of litigation" situation. Here, the State of Connecticut did not take *ex post facto* action to remedy unlawful employment discrimination following the accrual of a cause of action to the respondents and after institution of suit. Rather, the plaintiffs below chose to institute liti-

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[24]*See* note 14, *supra* and accompanying text. *See also Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374, 1386 (5th Cir. 1978), *cert. denied sub nom., Steel Workers Local 13000 v. Parson*, 441 U.S. 968 (1979) ("[A]ctions taken in the face of litigation are equivocal in purpose, motive and permanence . . . and do not redress the grievances of those injured by the previous practices.").

gation before the selection procedures were complete, and the employer merely let the selection procedure run its course. No one will ever know whether the results of the selection procedure were affected by the filing of suit, but this was the choice of the plaintiffs below.

C. Some Statistics Are More Probative Than Other Statistics.

In most class-type employment discrimination lawsuits, statistics play the dominant role. The primary battleground is the probative force of the statistics used to support plaintiffs' presentation of the prima facie case vis-a-vis any alternative statistical analysis offered by the defendant. Most statistically-based cases are decided by determining which statistics are more appropriately focused and therefore more probative.[25] As this Court made clear in *Dothard v. Rawlinson*,[26] once the plaintiff has introduced statistics in support of its case, the defendant is free to introduce more probative statistical analysis "[i]f the employer discerns fallacies or deficiencies in the data offered by the plaintiff."

The key decision of this Court analyzing the relative probative force of alternative statistical presentations is of course *Hazelwood School District v. United States, supra*. In *Hazelwood*, the Court drew the following comparisons between probative and *more* probative statistics:

(1) "Time-frame" or "flow" statistics are more probative than "static" or "snapshot" statistics of an employer's work force at a fixed period in time;[27]

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[25]*See* Schlei and Grossman, *Supplement* at 319 ("Since statistics 'come in infinite variety,' [citing *Teamsters*] the key battleground has become *what* statistics are more probative.") (Emphasis in original).

[26]433 U.S. 321, 331 (1977).

[27]433 U.S. at 309-11. *See* notes 5-12, *supra* and accompanying text. *See also Movement for Opportunity and Equality v. General Motors Corp.*, 622 F.2d 1235, 1244-45 (7th Cir. 1980) (prima facie case based on snapshot statistics rebutted by time-frame statistics); *Vuyanich v. Republic National Bank*, 505 F. Supp. 224, 360 (N.D. Tex. 1980) ("[W]ithout question flow statistics are a superior measure of hiring discrimination during a given time period.").

(2) Qualified potential applicant statistics are more probative than general population statistics;[28]

(3) Statistics honed to the proper geographic area are more probative than undifferentiated geographic statistics;[29] and

(4) Actual qualified applicant flow data is a more probative comparison to hiring statistics than theoretically available potential applicant flow data.[30]

Hazelwood and its progeny have established that all statistics are not created equal, that the more finely honed the statistic, the greater its relevance to what is actually happening in the selection process, the greater its probative value, and, concomitantly, if the employer presents statistics of equal or greater probative value to those presented by the plaintiff, and the employer's statistics show no substantial adverse impact, the employer will prevail.

Schlei and Grossman[31] analyzed "the problem of conflicting statistical conclusions" as follows:

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[28]This Court stated: "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." 433 U.S. at 308 n. 13.

[29]In *Hazelwood*, the question was whether the City of St. Louis, which had committed itself to having 50% of its teachers be black, should be included in the geographic area from which Hazelwood could potentially draw teachers. The Court directed trial of this issue on remand. 433 U.S. at 308.

[30]The Court noted that such applicant flow data would be "very relevant." 433 U.S. at 308 n. 13. Numerous lower courts have so held. *See, e.g., United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981) (applicant flow data found to be the most probative proof of availability); *Hester v. Southern Ry.*, 497 F.2d 1374, 1379 (5th Cir. 1974) ("The most direct route to proof of racial discrimination in hiring is proof of disparity between the percentage of blacks among those applying for a particular position and the percentage of blacks among those hired for the position.").

[31]*Supra* note 25 at 329.

"Virtually all of the well-tried class action cases now present the problem of conflicting statistical conclusions. That result is understandable in light of the great variety of possible 'sources' of statistics . . . . [F]our generalizations may be stated concerning how courts deal with this problem.

"First, 'finely tuned' statistics are normally far more probative than generalized statistics. Second, 'time frame' statistics are normally far more probative than 'static' statistics. *Third, 'bottom line' statistics are normally more probative than 'component part' statistics.* Fourth, once conflicting statistical conclusions result from statistics which are reasonably particularized and reliable (and therefore reasonably probative), the plaintiff will normally be found not to have sustained its ultimate burden of proof regarding the showing of discriminatory impact." [Emphasis added].

D. The Bottom Line Concept Has Received Almost Uniform Acceptance as a Superior Statistic to Component Statistics.

1. Explanation of the Bottom Line Concept.

The "bottom line" approach recognizes that the disparate impact of one portion of a selection procedure may be balanced by other elements of the process: although one component has a substantial adverse impact upon a protected group, another component may favor that group, whereas a third component may favor still another protected group, and that the most probative of the statistics is a statistical measure of the entire process. In a typical bottom line case, the plaintiff presents valid statistics establishing a substantial disparity between the success rate of the protected group and the success rate of the majority group with respect to *one component of the selection process*, such as a scored test. For example, the plaintiff might establish that 1,000 whites and 500 blacks took a scored test, and that 500 whites

(50%), but only 150 blacks (30%) passed the test. The defendant[32] would respond by pointing out that the impacting component is only one portion of a multistage selection process, that other components of the selection process favor blacks, and at the "bottom line," there is no substantial statistical disparity. In the above example, the defendant might present evidence that the other components of the selection process resulted in the hiring of 100 whites (10% of the original applicants), and 45 blacks (9% of the original applicants).[33] Thus, under any test of statistical significance,[34] at the "bottom line" there is no substantial statistical disparity.

2. The Courts and Commentators Are Virtually Unanimous in Accepting the Bottom Line Concept.

The decision of the Second Circuit below is an aberration from a clear line of authority endorsing the bottom line concept as a superior form of statistic.

In *EEOC v. Greyhound Lines, Inc.*,[35] the EEOC attacked the employer's policy of refusing to consider bearded men for public contact positions. Because of a skin condition peculiar to blacks which prohibits many blacks from shaving, this policy had a substantial adverse impact upon

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[32]The bottom line approach frequently benefits plaintiffs. For example, if none of the components of a multistage selection process had a statistically significant disparate impact, the bottom line might nevertheless show such an impact. If blacks fared 80% as well as whites on each stage of a five-stage selection procedure, at the bottom line blacks would only fare 33% as well as whites ($.8^5 = .328$). *See Vulcan Society of NYC Fire Dep't, Inc. v. Civil Service Comm'n*, 360 F. Supp. 1265, 1272 (S.D.N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973) (defendant contended that plaintiff's proof improperly lumped together the impact of several components; the trial court rejected this approach, noting "the examination may not be truncated; whether or not it has an adverse discriminatory impact upon minority groups should be considered in terms of the total examination procedure.").

[33]This would mean that after the test, 20% of the 500 remaining whites but 30% of the 150 remaining blacks succeeded.

[34]*See* note 8, *supra*.

[35]635 F.2d 188, 193 (3rd Cir. 1980).

blacks. The Third Circuit found this irrelevant, because the employer employed a higher percentage of black male employees in its public contact jobs than would be expected due to their availability.[36]

In *EEOC v. Navajo Refining Co.*,[37] the defendant used as a "knock-out" its requirement, as a prerequisite to employment, of a high school diploma or equivalent and a passing grade on a test.[38] The court of appeals held that the disparate impact of the test and high school diploma requirement did not result in illegal discrimination since in a community with a 23.2% Hispanic work force, and an applicant flow that was 30% Hispanic, Hispanics constituted 38% of the employer's hires.[39]

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[36]*Id.* ("We need not consider the alleged disparate impact of Greyhound's no-beard policy because there was no actual discrimination or disparity in its hiring").

[37]593 F.2d 988 (10th Cir. 1979).

[38]*Griggs v. Duke Power Co., supra* note 22 found illegal high school diploma and test-passing requirements where these requirements did have an actual effect on the ability of the protected group to receive the jobs at question.

[39]593 F.2d at 990. Numerous other courts have preferred bottom line statistics. *E.g., Friend v. Leidinger*, 588 F.2d 61, 66 (4th Cir. 1978), *aff'g*, 446 F. Supp. 361 (E.D. Va. 1977) ("The best comparison is between the number of blacks and whites who initially sought promotion . . . and the number who were actually promoted."); *Rule v. International Ass'n of Bridge, etc., Workers*, 568 F.2d 558, 565 & n. 10 (8th Cir. 1977) (plaintiffs challenged aptitude test, which accounted for 15 of a possible 100 points which would determine who could enter an apprenticeship program; this approach rejected in favor of bottom line approach since "as the process as a whole does not have a disparate exclusionary impact on blacks, then the fact that blacks fare less well than whites on one 'subtest' is insufficient to establish a prima facie case."); *Smith v. Troyan*, 520 F.2d 492, 497-98 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976) (blacks fared badly on a particular test, but did almost as well as whites with respect to actual hiring; a test with a disparate impact need not be validated unless there is a substantial disparity in the hiring rate, and the fact that 33% of the applicants were black and 29% of the hires were black "not sufficient"; "that blacks fare less well than whites on . . . a 'subtest' in the process of hiring . . . police officers, is insufficient . . . to require defendants to justify the [test] as being job-related."); *Hester v. Southern Ry. supra* note 30

(footnote continued on following page)

Furthermore, the federal government's Uniform Guidelines on Employee Selection Procedures recognize and endorse the bottom line concept to the extent that:

> "If this information [concerning the total selection process] shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection."[40]

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at 1381-82 (district court's testing relief is overturned where entered "without competent proof of discrimination by the railway in its hiring . . . ."); *Cormier v. P.P.G. Indus., Inc.*, 519 F. Supp. 211, 278 (W.D. La. 1981) ("In examining selection procedures which allegedly have had a disparate impact, the court must first determine whether the selection procedure in its entirety has resulted in a meaningful or substantial exclusion of blacks from the job opportunity in question. If there is no disparate impact in the overall process then there is no prima facie case of disparate impact discrimination."); *Stewart v. Hannon*, 469 F. Supp. 1142, 1149 (N.D. Ill. 1979) ("knock-out" written component of selection process had adverse impact; insufficient since "[t]he challenge is . . . to one component of the hiring decision, not to the decision itself. This is not enough . . ."); *Brown v. New Haven Civil Serv. Bd.*, 474 F. Supp. 1256, 1261 (D. Conn. 1979) ("the majority [of courts] have held that the selection process as a whole, rather than any segment of it, should be examined for disproportionate impact in a Title VII case."); *Lee v. City of Richmond*, 456 F. Supp. 756, 771 (E.D. Va. 1978) ("The crucial fact in determining disparate impact is the rate at which blacks are ultimately chosen for the position rather than their test scores made in the process of selection."); *Kirkland v. New York State Dep't of Correctional Servs.*, 374 F. Supp. 1361, 1370 (S.D.N.Y. 1974), *aff'd* 520 F.2d 420, 425 (2nd Cir. 1975), *cert. denied*, 429 U.S. 823 (1976) (§ 1983 case) ("Any other approach conflicts with the dictates of common sense."); *Jackson v. Nassau County Civil Serv. Comm'n*, 424 F. Supp. 1162, 1168 n. 11 (E.D.N.Y. 1976) ("if the final result of the examination procedure does not evidence a discriminatory impact, cultural or racial bias in individual test items is irrelevant.").

[40]29 C.F.R. § 1607.4 (1981).

E. Bottom Line Statistics Are More Probative Than Component Statistics and It Is to Bottom Line Statistics That the Appropriate Test of Statistical Significance Is Applied; Bottom Line Statistics Are Not a Defense Under Which the Employer Must Establish Bottom Line Equivalence.

Consider, hypothetically, that the State of Connecticut is hiring highway patrol officers. The first stage of the hiring is a test, the test has a substantial disparate impact, but of the 1,000 blacks and 1,000 whites who apply, Connecticut ultimately hires 100 whites (10% of the white applicants) and 99 blacks (9.9% of the black applicants). If the "bottom line" approach is viewed as a defense and, furthermore, if to establish the defense, the employer must prove *bottom line equivalence*, Connecticut would lose in this hypothetical, whereas if one more black were hired, Connecticut would prevail. Since in the actual case before the Court, Connecticut established far more than bottom line equivalence, Amici are concerned that in ruling for the State of Connecticut this Court will use language which could lead lower courts to conclude that the bottom line approach is a defense, and moreover, the employer must bear the burden of proof to establish bottom line *equivalence*. The following factors support the view that bottom line statistics are a superior form of statistics and not a defense:

(1) This Court has held many times that in disparate impact cases, the burden does not shift to the employer unless and until disparate impact is established by proper statistical proof.[41]

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[41] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (employer's burden to show job-relatedness arises only if plaintiff establishes that selection procedures "select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."). *See generally* Schlei and Grossman, *Employment Discrimination Law* (BNA 1976) (hereinafter cited as *Treatise*) and *Supplement*, Chapter 36 (Proof), Section II.

(2) In each of the decisions endorsing the bottom line concept set forth in Section D.2., *supra*, the court correctly analyzed bottom line statistics in determining whether the plaintiff had established its prima facie case, with the burden of proof remaining at all times on the plaintiff on this issue.

(3) In *Teal*, even the Second Circuit correctly analyzed that the bottom line approach related to whether or not the plaintiff had established a prima facie case.[42]

(4) In *Hazelwood*, this Court clearly established that when a defendant comes forward with more probative statistics, it is to those statistics that the test of statistical disparity will be applied.[43]

If the bottom line approach is viewed as a defense, and further, for it to be applicable, the employer must prove bottom line equivalence, severe and undesirable results would occur. Consider the following hypothetical, under which each of the three stages in the selection process is a knock-out:

	White Pass Rate	Black Pass Rate	Hispanic Pass Rate	Female Pass Rate	Male Pass Rate
Stage I	80.0%	60.0%	50.6%	50.4%	60.0%
Stage II	51.0%	80.0%	60.0%	80.0%	50.2%
Stage III	60.0%	50.8%	80.0%	60.0%	80.0%
Final Selection Rate	24.5%	24.4%	24.3%	24.2%	24.1%

Under this example, if the employer had to prove bottom line equivalence when one or more components had a substantial adverse impact, the employer would be liable to blacks, Hispanics, and males, and, arguably, if females could be considered in relation to whites, to females also. In short, when two or more groups are being statistically compared, it is rare to find exact equivalence between any

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[42]645 F.2d at 133.

[43]*See* note 9, *supra*.

two, let alone more than two. If equivalence is the standard, and different groups fare differently on different components of the selection process, liability to some group will almost always be found. The only way to avoid such illogical results, with large liability dependent upon minuscule differences in effect, is to recognize bottom line statistics for what they are, a superior statistical analysis of the selection process, and thus the statistics to which the appropriate test of statistical significance is applied.

F. The Second Circuit's Conclusion That a "Pass-Fail" or "Knock-Out" Barrier Renders the Bottom Line Approach Inapplicable Is Contrary to Both Extensive Authority and Logic.

The essence of the decision by the Second Circuit below is that a multi-component selection process containing one component having disparate impact does not violate Title VII so long as all candidates are permitted to complete the entire process, whereas the identical process does violate Title VII if the process contains a "knock-out" or "pass-fail" barrier that does not permit all candidates to complete the entire selection process. Thus, the Second Circuit below held:

> "*Where all of the candidates participate in the entire selection process, and the overall results reveal no significant disparity of impact, scrutinizing individual questions or individual sub-tests would, indeed, 'conflict [ ] with the dictates of common sense.'* [citation omitted] *Where, however, an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process, a different result must obtain*' "[44]

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[44]645 F.2d at 138 (Emphasis added).

In reaching this conclusion, the Second Circuit confused the disparate treatment and disparate impact theories. It relied heavily on this Court's decision in *Furnco*, a disparate treatment case, citing this case for the following proposition:

> "Where an employment practice forecloses a disproportionate number of persons in a protected group from a job opportunity, it matters very little to the victimized individuals that their group as a whole is well represented in the group of hirees."[45]

The argument which the Second Circuit accepted, described above, that the disparate treatment principles set forth in *Furnco* are applicable to disparate impact cases, was proposed by the EEOC to the Third Circuit in *EEOC v. Greyhound Lines, Inc.*[46] In rejecting the contention that disparate treatment principles are applicable to disparate impact cases, the Third Circuit thoroughly analyzed the distinctions between the theories:

> "EEOC could not contend, in the face of this data, that black males were underrepresented in Greyhound's workforce. It argues, however, that a disparate impact case can be established without proof of a discriminatory effect on the workforce. In support of that proposition, it relies primarily on the following passage from *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978): 'It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force.' *Id.* at 579, 98 S.Ct. at 2950 (emphasis in original). Read in its context, however, *Furnco* does not support the Commission's argument. *Furnco* was not a case of disparate impact,

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[45]*Id.* at 140.
[46]635 F.2d 188 (3d Cir. 1980).

but a case of 'disparate treatment' under the theory of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973). There can be no doubt that each worker is entitled to equal treatment regardless of his race; hiring members of a racial group in proportion to its share of the population does not license an employer to treat subsequent applicants unfairly on account of their race. *Furnco* does not apply to the case before us, however, where there is no allegation of disparate treatment on account of race but only that a facially neutral policy has had a disparate impact.

"We hold, therefore, that no violation of Title VII can be grounded on the disparate impact theory without proof that the questioned policy or practice has had a disproportionate impact on the employer's workforce. This conclusion should be as obvious as it is tautological: there can be no disparate impact unless there is disparate impact."[47]

The Third Circuit thus applied the bottom line concept even though the challenged selection criterion was a first-stage "knock-out" which did not allow the individual to proceed further in the selection process. Numerous other courts have endorsed the bottom line approach where the challenged component was a "knock-out" or "pass-fail" barrier.[48]

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[47] *Id.* at 192.

[48] *EEOC v. Navajo Refining Co.*, 593 F.2d at 992 (high school diploma or equivalent and passing score on test were "knock-outs"); *Stewart v. Hannon*, *supra* note 39 (failure of assistant principals to score high enough on pencil-and-paper test to get to interview stage); *Friend v. Leidinger*, 588 F.2d 61, 66 (4th Cir. 1978), *aff'g*, 446 F. Supp. 361, 372-73 (E.D. Va. 1977) (challenge to "knock-out" written component of promotion procedure rejected since bottom line showed 4.5% of black applicants and 5.3% of white applicants were finally promoted; challenged written test had adverse impact upon blacks because only 21% of blacks passed whereas 36% of whites passed); *Brown v. New Haven Civil Serv. Bd.*, 474 F. Supp. at 1260 (120 of 194 whites passed but only 30 of 99 blacks passed "knock-out" written examination; bottom line revealed no significant disparity).

The fallacy in the Second Circuit's reasoning can be demonstrated by a *reductio ad absurdum* example. Assume that the State of Connecticut uses a two-component selection process for promotion to Welfare Eligibility Supervisor. One component is a written test; the second component is a point-count score from supervisorial performance evaluations. For ease in administration, the applicants are divided into three groups, each group has the same racial make-up, and one-third of the positions will be filled from each group of applicants. Groups A and B require a candidate to receive *both* a 70% score on the test and a 70 out of 100 point count on the supervisorial evaluations. Assume that for each group 60% of the whites but only 40% of the blacks pass the test, but that 60% of the blacks and only 40% of the whites pass the performance evaluation cutoff. Assume further that Group A administers the "knock-out" test component first, and that Group B administers the "knock-out" supervisorial evaluation component first. Assume that Group C administers both components to everyone, and subjectively chooses those candidates who do "best" on a combination of test score and performance evaluation. Moreover, in all three groups, 24% of the black applicants and 24% of the white applicants are promoted.

Under the rationale of the Second Circuit, certain blacks in Group A and whites in Group B have definitely established a prima facie case and will recover, unless the employer proves the job-relatedness of its selection devices, since they were prevented from moving to the next step of the process. Although the Second Circuit's rationale is not clear, arguably certain whites in Group A and blacks in Group B can also recover, since they were "knocked out" by a discrete component, albeit the final step of the selection process, which component had a disparate impact. However, no one in Group C can possibly prevail even though the unstructured and subjective selection process led to exactly the same percentage of successful black and white

candidates as did the processes in Groups A and B.[49] To state the above example is to demonstrate the irrationality of the approach.

G. The Second Circuit's Preference for a Promotion Procedure Without Any "Knock-Out" Components Violates This Court's Admonitions in Furnco.

Apparently the Second Circuit felt that Connecticut would consider the qualifications of more minorities if it was required to allow all applicants to go through the entire selection process, with no stage of the selection process being a "knock-out." Thus, the Second Circuit, despite a lack of bottom line disparate impact, wanted the employer to consider beyond the test stage the qualifications of the largest possible number of minority applicants. Such an approach directly contradicts this Court's admonitions in *Furnco*:

> "The Court of Appeals . . . thought Furnco's hiring procedures not only must be reasonably related to the achievement of some legitimate purpose, but also must be the method which allows the employer to consider the qualifications of the largest number of minority applicants. We think the imposition of that second requirement simply finds no support either in the nature of the prima facie case or the purpose of Title VII."[50]

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[49]Such a result is especially ironic in light of the frequency with which courts in employment discrimination litigation have condemned subjective hiring and promotion processes. *See generally* Schlei and Grossman, *Treatise* and *Supplement*, Chapter 6 (Subjective Criteria).

[50]*Furnco Construction Corp. v. Waters*, 438 U.S. at 576-77. *See also* note 16. Although *Furnco* was a disparate treatment case, this Court's conclusion that the federal courts were ill-suited to structure selection procedures, absent illegality, has relevance to the whole field of employment discrimination law.

H. Unless Reversed, the Second Circuit's Decision Will Present Monumental Practical Problems for Any Employer Having a Multi-Component Selection Process, and for Governmental Employers in Particular.

There is no question that if the Second Circuit's decision is not reversed, it will have a tremendous and devastating impact upon any employer using a test as a component of its selection process, and upon public employers in particular. Many, if not most, civil service systems require a written test as a component of the selection process. Under the Second Circuit's rationale, even if the entire selection process did not have substantial adverse impact upon any protected group, the plaintiff could establish a prima facie case of discrimination if a pass-fail written test component did have such an adverse impact. The employer thereafter would be required to undertake a validation study to demonstrate that the test was in fact job-related. Unfortunately, such validation studies, even in those instances where they can be performed, are expensive.[51]

Aside from the monumental problems faced by employers attempting to validate tests, there is the practical problem that employers often do not and cannot know whether a test has a disparate impact on any protected group until the test is given. Once the test is given, however, and if disparate impact is shown, the employer can then engage in corrective measures including affirmative action to assure that the overall process does not have a disparate impact. This approach has been approved by the government's Uniform

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[51]Thus, the principal draftperson of the 1970 EEOC testing guidelines has testified that he is aware of only three or four criteria-related validation studies which met those guidelines, and that the only one of those three or four whose costs he knew involved a sample of approximately 200 bus drivers and had required an expenditure of approximately $400,000. Schlei and Grossman, *Treatise* at 103 n. 60.

Guidelines on Employee Selection Procedures, which provide:

> "*Where validity studies cannot or need not be performed.* There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job-related as possible and which will minimize or eliminate adverse impact, as set forth below."[52]

Under the Second Circuit's rationale, if validation is impossible or not feasible, and one component of the selection process has adverse impact, the law would require that each and every applicant be permitted to complete the entire selection process. This would have disastrous consequences for government employers in terms of both tremendous costs and inability to effectively administer their selection processes. For example, under the Second Circuit's rationale, if the State of Connecticut were going to hire 250 new highway patrol officers, and it received 10,000 applications for those positions, if the testing component (or any component) of the selection process had adverse impact, the State would be required to permit all 10,000 applicants to complete all components of the selection process, regardless of the fact that many of the applicants have no chance whatsoever of being selected because of their inability to achieve a minimum passing score on a test. Completion of an entire selection process with 10,000 applicants would take years, and until the process was complete, the State would be unable to fill those 250 positions.

In short, the Second Circuit's decision makes no sense as a matter of fact, as a matter of law, or as a matter of practicality, and must be reversed.

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[52]29 C.F.R § 1607.6(B) (1981).

I. Rejection of the Bottom Line Approach Is Inconsistent With the Stage II Procedures Mandated by This Court.

Employment discrimination class actions are normally bifurcated into two phases: Stage I determines the defendant's liability, and Stage II determines individual entitlement to back pay relief.[53] At Stage II, the court determines the "shortfall," *i.e.*, the difference between the number of protected class members who should have been hired or promoted absent discrimination, and the number of blacks who were actually hired or promoted.[54] It then allocates the "shortfall" to those class members whom it concludes would have been hired or promoted in the absence of discrimination.[55]

If there is no bottom line disparity, there is no "shortfall," and no number of spots to be allocated among the class members. Rejection of the bottom line concept would thus be inconsistent with the relief procedures mandated by *Teamsters*.

V.
CONCLUSION.

For all of the foregoing reasons, amici curiae respectfully submit that the decision of the Second Circuit should be reversed, that bottom line statistics, when available, should be properly recognized as superior to component statistics.

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[53]*See* Schlei and Grossman, *Treatise* at 1260. In *Teamsters v. United States*, 431 U.S. 324 (1977), this Court approved of such bifurcation in a government pattern-or-practice suit:

> "When the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief."

431 U.S. at 361.

[54]*Teamsters v. United States*, 431 U.S. at 371-72.

[55]*Id.* ("[T]he court will be required to balance the equities of each minority employee's situation in allocating the limited number of vacancies that were discriminatorily refused to class members.").

and thus, when so available, as the statistics *to which the appropriate test of statistical significance is applied.*

DATED: December 3, 1981.

Respectfully submitted,

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No. 80-2147

In the Supreme Court of the United States

OCTOBER TERM, 1981

CONNECTICUT, ET AL., PETITIONERS

v.

WINNIE TEAL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964 allows an employer to show that an employee selection procedure as a whole does not have a disparate racial impact in order to rebut a showing that a single component of the process does have such an impact.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The responsibility for federal enforcement of Title VII of the Civil Rights Act of 1964 is shared by the Department of Justice and the Equal Employment Opportunity Commission (EEOC).* The Attorney General has authority to bring civil actions against state and local government employers. 42 U.S.C. (& Supp. III) 2000e-6. The Commission has authority to bring civil actions against private employers under 42 U.S.C. 2000e-5(f)(1). This case concerns the availability of the "bottom line" defense in Title VII suits, a question concerning the scope of the Act that may affect federal administration and enforcement.[1]

* The EEOC has declined to join in this brief.

[1] In 1978, the Department of Justice and the EEOC, together with the Department of Labor and the Civil Service

STATEMENT

This action was filed on April 6, 1979, against petitioners (the State of Connecticut, two state agencies and two state officials) by eight employees of one of the agencies, the Department of Income Maintenance. Four of the plaintiffs are black; four are white (Pet. App. 19a). The only claim of the black plaintiffs at issue before this Court is the allegation that their employer violated Title VII of the 1964 Civil Rights Act (42 U.S.C. 2000e *et seq.*) by using, as part of a selection process for promotions, a written test that was not job-related and that excluded blacks in disproportionate numbers from further participation in the selection process.[2] Respondents claimed both that the test constituted intentional disparate treatment and that, in any event, it had a racially disparate impact prohibited

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Commission, issued Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. 50.14, 43 Fed. Reg. 38290 (1978). Section 4C provides that where the total employee selection process does not have an adverse impact on a protected group, the federal agencies as a matter of prosecutorial and administrative discretion will not, in the absence of circumstances not present in this case, take enforcement action against an employer or expect employers to validate separate parts of the selection process. See *infra*, pages 16-17 & n. 15.

[2] The black plaintiffs also asserted violations of 42 U.S.C. 1981, and the Equal Protection Clause of the Fourteenth Amendment under 42 U.S.C. 1983. One black plaintiff alleged that she was terminated in retaliation for filing discrimination charges. All plaintiffs asserted a due process claim under 42 U.S.C. 1983 and a claim that the test violated a Connecticut statute requiring state employment tests "to measure the knowledge, skill or ability required to perform the duties of the job" (Pet. App. 26a). The district court rejected these claims (Pet. App. 24a-26a). None of them are at issue in this Court.

by Title VII (see *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)). The employer claimed that no violation of Title VII occurred because the test was job-related and because, in any event, the overall promotion process did not have a disparate impact on blacks.[3]

Respondents took the challenged test in December 1978 as the first part of a promotion process for selecting Welfare Eligibility Supervisors (Pet. App. 7a). At the time they took the test, respondents held provisional appointments in these supervisory jobs (Pet. App. 6a).[4] Because they failed to pass the test, they were excluded from further consideration for permanent appointment to these positions (Pet. App. 7a).

The test results, broken down by race, are as follows (Pet. App. 20a):

	# taking test	# passing test	% passing test
Black	48	26	54.17
Hispanic	4	3	75.00
Indian	3	2	66.67
White	259	206	79.53
Unidentified	15	9	60.00
	329	246	74.77

These results are based on a passing score that was set at 65 rather than 70 in order to lessen the severity

[3] Most of the evidence before the district court related to the employer's claim that the test was job-related—*i.e.*, the validation issue.

[4] A total of 41 individuals (10 black and 31 white) held such provisional appointments (Tr. 239, 247 (May 27, 1980)).

of the disparate racial impact (Tr. 328 (May 28, 1980)). However, even using the lower score, the passing rate for all blacks was still only 68% that for white candidates, which establishes adverse impact under the "four-fifths" rule of thumb defined by Section 4D, Uniform Guidelines on Employee Section Procedures (1978) (28 C.F.R. 50.14(4D)).[5]

This action was filed before any promotions were made (Pet. App. 9a). Initially, respondents sought a court order to prevent promotions based on the test results; because petitioners agreed not to act until the case was tried, no order was issued. Although the record does not directly address this point, petitioners have informed us that when they later sought court permission to make promotions, the court allowed them to go forward if slots were left open for respondents should they ultimately prevail (see Pet. Br. 5 n. 3).

Under state law, all persons who passed the test and whose scores fell in the top five ranks could be considered for each job opening (Tr. 247 (May 27, 1980); Tr. 356 (May 28, 1980)).[6] For each additional vacancy, the scorers in the next lower rank could also be considered (Tr. 249 (May 27, 1980)). Because there were 46 vacancies and only a total

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[5] Section 4D provides in relevant part:

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

[6] Each rank was composed of individuals receiving the same score (Tr. 247 (May 27, 1980)).

of 25 ranks among those who passed the test, the effect of the state law was that all persons who passed could be considered (Tr. 249 (May 27, 1980); Tr. 356 (May 28, 1980)).[7]

The final promotion decisions were based primarily on past work performance and supervisors' recommendations; seniority was also considered (Pet. App. 7a). In addition, the state employed an affirmative action program to insure that minorities were well represented in the supervisory positions (*ibid.*). Forty-six persons, 11 blacks and 35 whites, were promoted to permanent supervisory positions (Pet. App. 9a). There apparently was an effort to promote as many provisional appointees who passed the test as possible (Tr. 247 (May 27, 1980)); all five black provisional appointees who passed the exam received promotions (Tr. 239 (May 27, 1980)). In all, 23% of the blacks and 13.5% of the whites who began the selection process were promoted (Pet. App. 20).[8]

2. The district court entered judgment for the employer. The court determined (Pet. App. 22a) that the case was properly viewed as a disparate impact case; indeed, the court found (Pet. App. 24a) that "evidence of discriminatory motive was wholly absent." In assessing the disparate impact claim, the court looked to the ultimate promotion results, not to the test results; because the promotion rate for blacks was greater than that for whites, the court ruled that plaintiffs had failed to show a disparate

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[7] The record does not disclose the scores of the persons who were ultimately promoted or the scores respondents received.

[8] These promotions resulted in a 17% black supervisory work force (Tr. 240 (May 27, 1980)). There was only one black in a permanent supervisory position prior to the time the promotions were made (*ibid.*).

impact (Pet. App. 24a). The court thus found it unnecessary to reach the question whether the test was job-related (Pet. App. 26a).

3. The court of appeals reversed, holding (Pet. App. 5a) that when a "plaintiff establishes that a component of a selection process produced disparate results *and* constituted a pass-fail barrier beyond which the complaining candidates were not permitted to proceed, a prima facie case of disparate impact is established, notwithstanding that the entire selection procedure did not yield disparate results."

The court distinguished this case from one where a portion of a job selection process may have an adverse impact and the selection process as a whole does not, but where all candidates participate in the entire process notwithstanding poor performance on the component having adverse impact (Pet. App. 11a-14a). The court suggested that use of such a process could make it difficult to identify either the discriminatory component or the affected individuals. In such a situation, therefore, the court of appeals found that the "prudent course to pursue" (Pet. App. 12a) was the application of the so-called "bottom line" theory: the results of the entire selection process should be the measure of adverse impact. Here, however, where "an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process" (*ibid.*), the court concluded that the barrier must be shown to be job-related. The court thus determined that the employer's affirmative action steps taken at the end of the promotion process would not relieve the employer of Title VII liability to persons "who have been victimized by a discriminatory

pass-fail barrier, notwithstanding any belated 'corrective' action taken by the employer" (Pet. App. 14a). The case was remanded to the district court for an evaluation of the job-relatedness of the test (Pet. App. 16a).[9]

SUMMARY OF ARGUMENT

1. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), this Court interpreted Title VII of the Civil Rights Act of 1964 to prohibit the use of employment tests and other employee selection devices that have a disparate racial impact and are not shown by the employer to be job-related. Here respondents proved the test's disparate impact on blacks, but the employer showed that other parts of the promotion process eliminated that effect, so that blacks were fairly represented among the employees selected for promotion. In this circumstance, Title VII affords no remedy in the absence of purposeful discrimination.

Congress did not intend Title VII to require an employer to establish that every test or other employee selection device is job-related. That burden is imposed only where there is a discriminatory impact

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[9] The court of appeals agreed (Pet. App. 11a) with the district court that the case should be analyzed as a disparate impact case rather than a disparate treatment one, because under the latter theory, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), requires plaintiffs to prove they are qualified for the jobs as part of their prima facie case. Here, the court of appeals reasoned, that would require plaintiffs to prove that the test was *not* job-related. In a disparate impact case, on the other hand, plaintiffs need only establish that a test has a disparate racial impact and the burden is then on the employer to prove that the test is job-related.

in the employment decision, because Title VII's sole purpose is to eliminate such discrimination. The statute was not intended to intrude on traditional management prerogatives in devising the particular processes by which employment decisions are made. The employer here insured that his promotion decisions did not have the effect of excluding disproportionate numbers of blacks from the jobs; Title VII does not require that he also establish that the test was the best, or even a generally fair, means of reaching those nondiscriminatory decisions.

Focusing on the disparate racial impact of intermediate steps in a selection process instead of the effects of the entire system could require the courts to evaluate an employer's justification for every part and perhaps every subpart of the process. The court of appeals recognized this practical difficulty, but its attempt to limit its holding was illogical. The court ruled that an employer is not required to validate a single component of a selection process that does not exclude individuals from participation in other parts of the process. Yet the unvalidated component could have precisely the same effect on individual candidates as the challenged system if the employer gives significant weight to test scores in making his final selection among the eligible candidates. Thus, requiring test validation under one circumstance and not the other exalts form over substance. In sum, since the overall selection process did not have a disparate impact, there was no Title VII violation.

2. Plaintiffs did not rebut the employer's showing that the overall selection process was nondiscriminatory. Although they established the disparate impact of the test, they elicited no reason for not accepting the final promotion results as a

proper measure of the propriety of the selection process. There was no suggestion that the applicant figures were artifically depressed because blacks were discouraged from applying. The evidence did not establish that the employer eventually promoted a large number of blacks in order to avoid liability to plaintiffs. There was no proof that this test had the effect of locking in prior patterns of discrimination. In these circumstances, the results of the overall selection process establish that there is no violation of Title VII in this case.

ARGUMENT

I

TITLE VII DOES NOT REQUIRE AN EMPLOYER TO PROVE THE JOB-RELATEDNESS OF AN EMPLOYMENT TEST THAT HAS A DISPARATE RACIAL IMPACT ON MINORITIES WHERE THE TEST IS PART OF A SELECTION PROCESS THAT, AS A WHOLE, DOES NOT HAVE SUCH AN IMPACT

A. Title VII prohibits the use of unvalidated employee selection devices only where there is discriminatory impact in the making of employment decisions

Title VII of the 1964 Civil Rights Act, 42 U.S.C. (& Supp. III) 2000e *et seq.*, was enacted in order "to achieve equality of employment opportunities." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429. (1971). Section 703(a)(2), 42 U.S.C. 2000e-2(a)(2), of the Act makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race * * *." Notwithstanding that provision, Section 703(h) provides that the use of a "professionally developed ability

test" in an employee selection process shall not constitute an unlawful employment practice "provided that such test, its administration or action upon the results is not designed, intended or used to discriminate becasue of race * * *."

From the language of the statute, one could argue, on the one hand, that the test here, if it is not job-related, was "used to discriminate" within the meaning of Section 703(h) because it excluded a disproportionate number of blacks from further consideration for promotion. On the other hand, it was not "used to discriminate" in that it did not deprive disproportionate numbers of blacks of the actual promotions. We believe that the latter interpretation better serves Congress' intent in enacting Title VII.

In *Griggs, supra*, this Court set forth the standards for determining when the use of an employment test violates Section 703(a)(2) and (h). The Court concluded, 401 U.S. at 432, that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." Thus, Title VII proscribes "not only overt discrimination but also practices [such as employment tests] that are fair in form, but discriminatory in operation," 401 U.S. at 431, and places upon employers the burden of showing that "any given requirement" has "a manifest relationship to the employment in question," 401 U.S. at 432.

But Title VII does not require proof of job-relatedness (validation) of every employee selection procedure absent a showing of discriminatory effect. In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975), this Court made clear that the employer's burden of proving the job-relatedness of a particular job requirement arises "only after the complaining

party or class has made out a prima facie case of discrimination, *i.e.*, has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." Thus, while the court of appeals is correct in stating (Pet. App. 12a) that Title VII was designed to protect individual employment rights, a disparate impact claim as articulated in *Griggs* and *Albemarle Paper* can be established only by proving an actual discriminatory effect on employee selection. Here, there was none.[10]

In both *Griggs* and *Albemarle Paper*, the discriminatory effects of the employment tests were reflected in the eventual employment decisions. Here, by contrast, the employer utilized other parts of the process to eliminate the adverse racial impact of the test. This promotion test was thus not a "controlling force" as in *Griggs*, 401 U.S. at 436, nor did the use of the test result in selections for promotion in a significantly different racial pattern from that in the applicant pool as in *Albemarle Paper*, 422 U.S. at 425. *Griggs* and *Albemarle Paper* also dealt with practices which "operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs*, *supra*, 401 U.S. at 430. The test here did not have such an

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[10] It is well established (*Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 579 (1978); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280-281 n. 8 (1976); *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971)) that the overall selection process' lack of a discriminatory impact would not defeat a claim of *intentional* discrimination, although it could be relevant to such a claim. See *McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 804-805; *Furnco Construction Corp.*, *supra*, 438 U.S. at 580; *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 584 n. 25 (1979). The district court here found (Pet. App. 24a) that "evidence of discriminatory motive was wholly absent."

effect. Indeed, the overall promotion process had the opposite effect. The percentage of blacks in the supervisory workforce increased from 4% to 17% as a result of these promotions. Title VII should not be interpreted to require validation of an employment test that is only a single component of a selection process that overall is not only "fair in form," but also "[non]-discriminatory in operation." *Griggs*, *supra*, 401 U.S. at 431.

Indeed, a basically similar claim was before this Court in *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 92 (1973), where the Court held that an employer's rule against hiring non-citizens had neither the purpose nor the effect of excluding persons of Mexican origin from employment. In determining whether the policy had a discriminatory effect on persons of Mexican origin, this Court looked to the proportion of persons of Mexican origin in the employer's workforce as a whole and in the job category and actual position for which plaintiff applied. It did not consider dispositive the fact that some persons of Mexican origin (and probably very few, if any, others) were excluded by the citizenship requirement.[11]

B. Focusing on the final results of the selection process serves the congressional purpose in enacting Title VII

1. Congress did not intend Title VII to intrude unnecessarily on employer prerogatives in selecting employees, but only to insure that artificial barriers would not deny equal employment opportunities

Title VII encourages voluntary compliance. Indeed, "[c]ooperation and voluntary compliance were selected as the preferred means" for achieving the Act's

[11] The record in *Espinoza* did not show the extent, if any, of disparate impact of the challenged employment practice.

goals. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Consistently with this approach of encouraging the private sector to take "effective steps to accomplish the goal that Congress designed Title VII to achieve" (*United Steelworkers of America* v. *Weber*, 443 U.S. 193, 204 (1979)), this Court has admonished against interpretations of Title VII that would "diminish traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals" (*United Steelworkers of America* v. *Weber*, *supra*, 443 U.S. at 207). The court of appeals here adopted just such an interpretation in requiring the validation of every intermediate selection procedure having a disparate racial impact, even though the employer has insured that the process as a whole results in promotions free from prohibited racial bias. An employer who insures that the results of his selection process are free from adverse impact should be allowed to exercise his management prerogatives concerning the details of that process without fear of liability to unsuccessful applicants. *Weber*, *supra*, 443 U.S. at 209-211 (Blackmun, J., concurring).

Nothing in Title VII prohibits an employer from basing nondiscriminatory employment decisions in part on unvalidated tests. The Act is designed to eliminate discrimination from employment decisions, not to guarantee that such decisions will be logically sound. In *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 578 (1978), this Court cautioned against interpreting Title VII to require employers to use the "best" hiring procedures, noting that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." In the absence

of discrimination, Title VII does not require that all employment decisions have "a manifest relationship to the employment in question." *Griggs*, *supra*, 401 U.S. at 432. Thus, even if the challenged test had the effect of denying these plaintiffs jobs for which they were well qualified, that unfairness by itself does not establish a violation of Title VII. Cf. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981).[12]

2. Requiring validation of every part of a selection process that has a disparate racial impact is neither practical nor useful

To examine each component of a selection process for job relatedness on a showing that the component had a racially disparate impact would, as one court has observed, "launch[] a court on a course that has no boundaries and no clear end." *Brown* v. *New Haven Civil Service Board*, 474 F. Supp. 1256, 1262 (D. Conn. 1979).[13] Nearly every part of a selection process that excludes candidates from further consideration would be vulnerable to challenge under such a

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[12] We note also that a principal claim of unfairness in the treatment of the plaintiffs here (both black and white) arose from the fact that they were allowed to serve in the supervisory positions for long periods of time, thus creating expectations that they would be among those eventually promoted. Any such unfairness is unrelated to the evils at which Title VII is directed.

[13] If a test having disparate racial impact must be validated even though the selection process as a whole does not disadvantage minorities, the next logical step would require validation of subparts of the test or even single questions having a disparate racial impact. See *Brown* v. *New Haven Civil Service Board*, *supra*; cf. *Smith* v. *Troyan*, 520 F.2d 492, 498 (6th Cir. (1975)), cert. denied, 426 U.S. 934 (1976).

standard. But this Court has noted in a related context that '[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 711 n. 20 (1978).

The court of appeals recognized the practical obstacles to such an expansive reading of Title VII, and thus ruled that the Act would not require validation of an employment procedure having a disproportionate adverse impact on blacks as long as all candidates participate in all parts of the process (Pet. App. 12a-14a). This attempt by the court of appeals to limit its theory does not withstand analysis. The court of appeals suggested that the absence of a "pass-fail barrier" to further consideration would make it impossible to ascertain whether one or more of the components had an adverse racial effect. However, to the extent that unsuccessful candidates for selection cannot identify the discriminatory element in the selection process, disparate impact can be measured only by the final result, and the question involved in this case cannot arise. There may be situations in which all candidates are exposed to the entire selection process, but one facet of that process can be shown to exclude blacks in disproportionate numbers in precisely the same way as the test here does. For example, under the court of appeals' theory the employer here would escape liability if he simply had allowed all candidates, regardless of test scores, to participate in every step of the process. Under that system, the employer would be free to consider the results of the test scores, and, on the basis of that

consideration, to promote the same individuals he did under the challenged system. It could still be shown that the lower test scorers were disproportionately black, *i.e.*, that the effect of the test was to exclude disproportionate numbers of blacks from any real chance for promotion even though all were allowed to continue in other steps of the selection process. The final results in both situations would be precisely the same; the same individuals would be effectively excluded by the test. But the court of appeals would require the employer to prove the test's validity in one circumstance but not the other. This approach exalts form over substance. There is no reason why the same principle should not be applied in both cases. "[T]he overall results of the process should be deemed a fair barometer of the fairness of the process" (Pet. App. 14a).[14]

The agencies responsible for enforcing Title VII have wrestled with the same practical problems, and concluded in the 1978 Uniform Guidelines on Employee Selection Procedures that the "bottom-line" principle represented an appropriate guide for the exercise of prosecutorial discretion in the enforcement of Title VII. See 43 Fed. Reg. 38290, 38291. This

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[14] Most lower courts have adopted this approach. See *Friend* v. *Leidinger*, 588 F.2d 61, 66 (4th Cir. 1978); *EEOC* v. *Navajo Refining Co.*, 593 F.2d 988 (10th Cir. 1979); *Brown* v. *New Haven Civil Service Board, supra; Cormier* v. *P.P.G. Industries, Inc.*, 519 F. Supp. 211, 278-279 (W.D. La. 1981); *Rule* v. *International Association of Bridge, Structural and Ornamental Ironworkers*, 568 F.2d 558, 565 n. 10 (8th Cir. 1977); *Lee* v. *City of Richmond*, 456 F. Supp. 756, 771 (E.D. Va. 1978); *Williams* v. *City & County of San Francisco*, 483 F. Supp. 335, 340 (N.D. Calif. 1979). Cf. *Smith* v. *Troyan, supra.*

conclusion represents the culmination of several years of agency experience in this area.[15]

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[15] The first "Guidelines on Employment Testing Procedures" were promulgated by EEOC on August 24, 1966. We are lodging a copy of these guidelines with the clerk of this Court. They did not directly address the "bottom-line" issue, but in encouraging employers to utilize other methods to supplement tests in making employee selections, the 1966 guidelines are consistent with a "bottom-line" analysis. Thus, they note that "employers who use tests, but treat them as only one of several factors in the hire or promotion process, have found valuable employees in minority groups who would have been excluded if the tests were the sole and controlling factor." Guidelines at 1. And tests were to be viewed "as only one component of the personnel system—no better or worse than the selection system of which they are a part" (*id.* at 2). Moreover, this first version of the Guidelines recognized that "[t]he characteristics of a test, apart from the situation in which it is used, are not sufficient evidence on which to judge its quality" (*ibid.*).

The 1972 Amendment to Title VII created the Equal Employment Opportunity Coordinating Council (composed of the Department of Labor, the Equal Employment Opportunity Commission, the Civil Service Commission, the Civil Rights Commission, and the Department of Justice) and gave it the task of eliminating inconsistencies among the operations of the federal agencies responsible for enforcing federal equal employment opportunity law. Pursuant to this statutory mandate, the council began work in 1973 on the development of uniform guidelines on employee selection procedures.

The effort was not initially successful. In 1976, three of the agencies (Labor, Justice and the Civil Service Commission) issued the Federal Executive Agency (FEA) Guidelines explicitly adopting the "bottom line" principle (41 Fed. Reg. 51734). The EEOC republished its 1970 guidelines (41 Fed. Reg. 51984), which—like the 1966 Guidelines—did not directly address the issue, in part because of its disagreement with the "bottom line" principle. The impasse was eventually resolved in 1978, when the four agencies promulgated the Uniform Guidelines on Employee Selection Procedures that are cur-

II

THE PLAINTIFFS DID NOT REBUT THE EMPLOYER'S SHOWING THAT ITS SELECTION PROCESS WAS NON-DISCRIMINATORY

Plaintiffs established that the promotion test had a disparate racial impact;[16] that was sufficient to carry their burden of going forward. It was not ultimately enough to establish a violation of Title VII. See *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 584 (1979). Here the employer rebutted plaintiffs' showing of the disparate impact of the test by establishing that the final results of the selection process were free of discrimination.[17] Plain-

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rently in effect, adopting the "bottom line" principle to guide the exercise of prosecutorial discretion.

The EEOC does, however, issue reasonable cause determination letters to charging parties on the basis of the disparate impact of tests or other components of the selection process—a practice that comports with our view of the "bottom line" theory as a defense to be established by the employer (see note 17, *infra*).

[16] Compare *EEOC* v. *Greyhound Lines, Inc.*, 635 F.2d 188 (3d Cir. 1980), where there was a failure to make the threshold showing that an employment practice had a disparate racial impact. In that case EEOC urged that the employer's rule prohibiting employees from wearing beards had a disparate impact on blacks. The charging party in the case was a black male who suffered from a skin disease that predominantly affects black males who shave. The court of appeals ruled that EEOC had failed to prove that the no-beard rule produced a disparate impact on blacks at any point in the process. Blacks were hired at a higher rate than the black percentage in the population, and there was no evidence showing that blacks were discouraged from applying because of the no-beard rule.

[17] That burden is properly placed on the defendant; it is a burden of going forward with evidence. Thus, as a conceptual matter, the "bottom-line" theory is best viewed as a defense. Title VII plaintiffs who can show that the test has a disparate impact should not be required to show that the eventual re-

tiffs failed to refute defendants' evidence of the selection process' overall impact by showing that the promotions made were a pretext for avoiding liability to them in this action, or that this case presented any other reason [18] for not taking the "bottom line" results to be the proper measure of whether the employer had violated Title VII.[19]

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sults will also necessarily have such an impact. Once the disparate impact of a test is established, it is reasonable to infer that the process as a whole will have a similar impact and any contrary information would be peculiarly within the knowledge of the employer. In this case, for example, promotions were not made until a month before trial. It is not clear from the record whether the non-discriminatory results were predictable at the outset, but it is likely that they were not, in part because the test was not used for ranking but only as a pass-fail barrier. Thus, until the selections were made, all members of the eligible pool presumably had an equal chance for selection. See pages 4-5, *supra*.

[18] An example might be a showing of a pattern of continued use of tests or other procedures having a disparate impact, which might make pertinent the questions whether the process over the years had produced discriminatory "bottom line" results or whether the process had been changed to avoid further disparate "bottom line" impact not only for the selection process in issue but also for later administrations.

[19] An employer should not be relieved of liability for the use of an unvalidated employment test having a disparate racial impact unless he establishes that it is part of a selection process that has a nondiscriminatory effect. It would not be sufficient to show that the employer has a racially balanced workforce. Past nondiscrimination should not be permitted to immunize present practices. *Furnco*, *supra*, 438 U.S. at 579. See also *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974). Similarly, as this Court ruled in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 341-342, 364 (1977), present nondiscriminatory policies or affirmative action efforts do not extinguish an employer's liability for past discrimination. See also *Furnco Construction*

The court of appeals implies (Pet. App. 9a) that the employer's delay in making promotions here was suspect. But apparently that delay was occasioned by the employer's agreement to accommodate plaintiffs by postponing action pending the outcome of the case. It was only when that accommodation interfered with its operations that the employer sought and received court permission to make the promotions (see page 4, *supra*).

Most of the evidence in the case dealt with the question of the test's validity; there is no detailed description of other parts of the selection process.[20]

Corp., supra, 438 U.S. at 584-585 (Marshall, J., concurring in part and dissenting in part). The court of appeals' reliance (Pet. App. 15a) on *Teamsters* is thus inappropriate because the employer here seeks only to avoid liability to applicants adversely affected by a process which, as a whole, was shown to be nondiscriminatory.

[20] Nothing in the record indicates that eligible blacks were discouraged from taking the tests. Therefore, the comparison between the percentage of black applicants and the percentage of black successful candidates was apparently an accurate indicator of the effects of the selection process. This would not be true, however, if it were shown that an employer's discriminatory requirements or policy discourage a disproportionately large number of members of the protected group from applying in the first place. See, *e.g.*, *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977) (height and weight limitations discouraged women applicants); *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977); *Teamsters, supra*, 431 U.S. at 365-366. In such a case, the composition of the applicant group will not give an accurate basis for judging the results of the selection process, and thus the use of the "bottom-line" analysis may be inappropriate. The Uniform Guidelines (*supra*, note 15) reflect this concern by requiring validation "where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job-related in the same or similar circumstances." 28 C.F.R. 50.14(4C).

The employer based the ultimate promotions on supervisors' recommendations, job performance, and seniority as well as affirmative action considerations.[21] The record does not suggest that the employer eventually promoted a large number of blacks simply to avoid liability in this suit. If there were such evidence, the final results would be, in effect, a pretext (cf. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-805 (1973)), and the courts would not be powerless to act. As this Court observed in *United States* v. *Oregon Medical Society*, 343 U.S. 326, 333 (1952):

> It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentence and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.

The employer's prior history of hiring blacks and the effects of previous administrations of this or other tests would be relevant to determining whether the promotions were pretextual. Also relevant would be any actions taken by the employer to design the system initially in a way so as to avoid adverse impact.[22] In the absence of evidence of a pretext,

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[21] Respondents have not challenged the affirmative action component of the employer's promotion process under Title VII (*Weber*, *supra*, 443 U.S. at 208-209), or under the Equal Protection Clause (*id.* at 200). It is doubtful whether they would have standing to raise these issues.

[22] See, *e.g.*, *EEOC* v. *Navajo Refining Co.*, 593 F.2d 988 (10th Cir. 1979), where the employer eliminated the disparate adverse effects on Spanish-surnamed Americans of a high school education requirement and testing devices by using a racial factor to adjust the test scores.

however, the court need not inquire into the means utilized to alleviate the disparate impact of the test.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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